

GRODSKY & OLECKI LLP
Allen B. Grodsky (SBN 111064)
allen@grodsky-olecki.com
John Metzidis-Drennan (SBN 259464)
john@grodsky-olecki.com
2001 Wilshire Boulevard, Suite 210
Santa Monica, California 90403
Telephone: (310) 315-3009
Facsimile: (310) 315-1557

Attorneys for Defendants
Maria Del Mar Martinez Sanchez and
FDS Solutions Limited

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

REFLEX MEDIA, INC., a Nevada
corporation,

Plaintiff,

vs.

MARIA DEL MAR MARTINEZ
SANCHEZ, an individual; FDS
SOLUTIONS LIMITED d/b/a
fndrtsmt.com, a United Kingdom
company; and Does 1-10, inclusive,

Defendants.

Case No. 2:17-cv-00491-FMO (JPRx)

Before the Hon. Fernando M. Olguin

**JOINT BRIEF RE: PLAINTIFF'S
AND DEFENDANTS' MOTIONS
FOR SUMMARY JUDGMENT**

Hearing:

Date: February 1, 2018
Time: 10:00 a.m.
Courtroom: 6D

Action filed: January 20, 2017
Motion Cutoff: January 11, 2018
FPTC: March 23, 2018
Trial: April 10, 2018

Pursuant to Section 1 of this Court's "Order Re: Summary Judgment
Motions" entered April 10, 2017 (Dkt. 19), Plaintiff Reflex Media, Inc. and
Defendants Maria Del Mar Martinez Sanchez and FDS Solutions Limited submit
the following joint brief in connection with their respective motions for summary
judgment:

TABLE OF CONTENTS

I.	PLAINTIFF REFLEX’S MOTION FOR SUMMARY JUDGMENT.....	1
A.	Introductions	1
1.	Plaintiff’s Introduction.....	1
2.	Defendants’ Response to Plaintiff’s Introduction	2
B.	Argument.....	4
1.	Reflex is Entitled to Summary Judgment on its Trademark Infringement Claim.	4
a.	Reflex has Ownership of a Valid Trademark.....	4
b.	Defendants’ Response to Plaintiff’s Section I.B.1.a and Objections to Evidence.....	5
c.	Defendants used the SEEKING ARRANGEMENT Trademark Without Consent.	5
d.	Defendants’ Response to Plaintiff’s Section I.B.1.c and Objections to Evidence.....	9
e.	Use of the Counterfeit SEEKING ARRANGEMENT Trademark is Likely to Cause Confusion.....	10
f.	Defendants’ Response to Plaintiff’s Section I.B.1.e.....	11
g.	Defendants Can Also Be Held Liable Under Claims of Contributory and Vicarious Trademark Infringement.	13
(i)	<i>Contributory Trademark Infringement.</i>	13
(ii)	<i>Vicarious Liability for Trademark Infringement.</i>	14
h.	Defendants’ Response to Plaintiff’s Section I.B.1.g and Objections to Evidence.....	15

TABLE OF CONTENTS

(continued)

1		
2		
3		
4	2.	Reflex is Entitled to Summary Judgment on its False
5		Designation of Origin Claim. 19
6	3.	Defendants’ Response to Plaintiff’s Section I.B.2. 20
7	4.	Reflex is Entitled to Summary Judgment on its Unfair
8		Competition Claim under Cal. Bus. & Prof. Code
9		§ 17200 et seq. 20
10	5.	Defendants’ Response to Plaintiff’s Section I.B.4. 21
11	6.	Defendant Sanchez is Personally Liable for the Conduct
12		of FDS Solutions..... 21
13	7.	Defendants’ Response to Plaintiff’s Section I.B.6. 22
14	8.	Plaintiff’s Requested Relief..... 22
15	9.	Defendants’ Response to Plaintiff’s Section I.B.8. 23
16	C.	Conclusion 25
17		
18	II.	DEFENDANTS FDS SOLUTIONS’ AND SANCHEZ’S MOTION
19		FOR SUMMARY JUDGMENT. 25
20	A.	Introductions 25
21	1.	Defendants’ Introduction..... 25
22	2.	Plaintiff’s Response to Defendants’ Introduction 27
23	B.	Statements of Facts 29
24	1.	Defendants’ Statement of Undisputed Facts 29
25	a.	The Parties..... 29
26	b.	Plaintiff Alleges A Massive Phishing Scheme, But
27		Produced Evidence Of Only Five E-mails Sent To A
28		Single E-mail Address..... 30

TABLE OF CONTENTS

(continued)

c.	Defendants Do Not Own Or Control The E-mail Addresses From Where The Five E-mails Were Sent. ..	31
d.	Defendants Had No Involvement In, or Knowledge Of, The Dissemination Of The E-Mails At Issue.....	31
e.	Defendants Did Not Authorize Anybody To Use FDS’s Name Or The Name of Any Of Its Websites In Connection With These E-mails.	32
f.	Plaintiff Has No Facts Showing That Sanchez Had Any Involvement In The E-mails It Claims To Be Part of A Phishing Scheme.....	34
2.	Plaintiff’s Statement of Undisputed Facts	35
3.	Plaintiff’s Evidentiary Objections to Defendants’ Statement of Uncontroverted Facts	35
a.	Objection to Declaration of Defendant Sanchez.....	35
b.	Objections to Characterization of “Hearsay” Evidence	36
C.	Argument.....	37
1.	Defendant Sanchez is Entitled To Summary Judgment.	37
a.	On The Undisputed Facts, Sanchez Is Not Liable for Trademark Infringement.....	37
b.	Plaintiff’s Response to Defendants’ Section II.C.1.a: The Standards for Infringement Based on Secondary Liability for Defendant Sanchez is the same as Corporate Defendant FDS.....	39

TABLE OF CONTENTS**(continued)**

c.	For The Same Reasons She Is Not Liable for Trademark Infringement, Sanchez is Not, On the Undisputed Facts, Liable for False Designation of Origin.	43
d.	Plaintiff's Response to Defendants' Section II.C.1.c: Defendants knowingly and willfully allowed Defendants to infringe on Plaintiff's Trademark, Therefore Defendants Are Also Liable for False Designation of Origin.....	43
e.	On the Undisputed Facts, Sanchez Is Not Liable Under California Business & Professions Code § 17200.	44
f.	Plaintiffs' Response to Defendants' Section II.C.1.e: Because Defendants Knowingly and Willfully Allowed its Agents to Infringe on Plaintiff's Trademark, Defendants are Liable for Unfair Competition.	44
g.	On The Undisputed Facts, Sanchez is Not Liable for Negligent Interference with Economic Advantage.	45
h.	Plaintiff's Response to Defendants' Section II.C.1.g: Plaintiff Will Move for Statutory Damages Rather than Pursue Its Claim for Negligent Interference.	46
2.	Defendant FDS is Entitled To Summary Judgment.	46
a.	On The Undisputed Facts, FDS Is Not Liable for Trademark Infringement.	46

TABLE OF CONTENTS**(continued)**

b.	Plaintiff's Response to Defendants' Section II.C.2.a.....	47
c.	On the Undisputed Facts, FDS Is Not Liable for False Designation of Origin.	47
d.	Plaintiff's Response to Defendants' Section II.C.2.c.....	47
e.	On the Undisputed Facts, FDS Is Not Liable Under California Business & Professions Code § 17200.	47
f.	Plaintiff's Response to Defendants' Section II.C.2.e: Plaintiff Had to Spend Time and Resources to Investigate Defendants Actions and Therefore Has Standing to Pursue its Unfair Competition Claim Under Section 17200.	48
g.	On The Undisputed Facts, FDS is Not Liable for Negligent Interference with Prospective Economic Advantage.	49
h.	Plaintiff's Response to Defendants' Section II.C.2.g: Plaintiff Will Move for Statutory Damages Rather than Pursue Its Claim for Negligent Interference.	50

TABLE OF AUTHORITIES

Cases:

Pages:

<i>I-800 Contacts, Inc. v. Lens.com, Inc.</i> , 722 F.2d 1229 (10th Cir. 2013)	3, 13, 15, 17, 18, 19, 40
<i>Acmet, Inc. v. Wet Seal, Inc.</i> , 2015 WL 11670161 (C.D. Cal. 2015)	24
<i>Adobe Sys. Inc. v. Childers</i> , 2011 WL 566812 (N.D. Cal. Feb. 14, 2011)	40
<i>Advertise.com, Inc. v. AOL Advertising, Inc.</i> , 616 F.3d 974 (9th Cir. 2010)	10
<i>AMC, Inc. v. Sleekcraft Boats</i> , 599 F. 2d 341 (9th Cir. 1979)	12
<i>Animal Legal Def. Fund v. LT Napa Partners LLC</i> , 234 Cal. App. 4th 1270 (June 10, 2015)	48
<i>Babbitt Electronics v. Dynascan Corp.</i> , 38 F.3d 1161 (11th Cir.1994)	40
<i>Binder v. Disability Grp., Inc.</i> , 772 F. Supp. 2d 1172 (C.D. Cal. 2011)	21
<i>Celotex Corp. v. Catrett</i> , 477 U.S. 317 (1986)	2
<i>Century 21 Real Estate Corp. v. Magee</i> , 1991 WL 318797 (C.D. Cal. 1991)	20
<i>Chase Inv. Servs. Corp. v. Law Offices of Jon Divens & Assocs., LLC</i> , 748 F. Supp. 2d 1145 (C.D. Cal. 2010)	21
<i>Coach, Inc. v. Sac a Main</i> , 2012 WL 5464347 (E.D. Cal. 2012)	11
<i>Coach, Inc. v. Sapatis</i> , 27 F. Supp. 3d 239 (D. N.H. 2014)	39
<i>Coach Servs. Inc v YNM, Inc.</i> 2011 WL 1752091 (C.D. Cal. May 6, 2011)	41
<i>Coleman v. Quaker Oats Co.</i> , 232 F.3d 1271 (9th Cir. 2000)	11
<i>Equal Rights Center. v. Post Properties, Inc.</i> , 633 F.3d 1136 (D.C.Cir. 2011)	48
<i>Fonovisa, Inc. v. Cherry Auction, Inc.</i> , 76 F.3d 259 (9th Cir. 1996)	13, 40

TABLE OF AUTHORITIES
(continued)

<u>Cases:</u>	<u>Pages:</u>
<i>Francis T. v. Village Green Owners Ass’n</i> , 42 Cal.3d 490 (1986)	45
<i>Geo M. Martin Co. v. Alliance Machine Sys. Int’l, LLC</i> , 2008 WL 1946925 (N.D. Cal. 2008)	5
<i>Gershwin Publishing Corp. v. Columbia Artists Management, Inc.</i> , 443 F.2d 1159 (2d Cir.1971)	13
<i>Gracie v. Gracie</i> , 217 F.3d 1060 (9th Cir. 2000)	23
<i>Gryphon Mobile Elecs., LLC v. Brookstone, Inc.</i> , 2016 WL 7637987 (C.D. Cal. July 12, 2016)	19, 43
<i>Gutowitz v. Transamerica Life Ins. Co.</i> , 126 F. Supp. 3d 1128 (C.D. Cal. 2015)	11, 16
<i>Halcyon Horizons, Inc. v. Delphi Behavioral Health Grp., LLC</i> , WL 1956997 (N.D. Cal. May 11, 2017)	4
<i>Hard Rock Café Licensing Corp. v. Concession Servs., Inc.</i> , 955 F.2d 1143 (7th Cir.1992)	14, 39, 45
<i>Innovation Ventures, LLC v. Pittsburg Wholesale Grocers, Inc.</i> , 2013 WL 1007666 (N.D. Cal. Mar. 13, 2013)	48
<i>Int’l Mfg. Co. v. Landon, Inc.</i> , 336 F.2d 723 (9th Cir. 1964)	21, 22
<i>Inwood Labs., Inc. v. Ives Labs., Inc.</i> , 456 U.S. 844 (1982)	13, 39
<i>JL Audio Inc. v. Kazi</i> , 2017 WL 4179875 (C.D. Cal. Sept. 18, 2017)	4
<i>Kelly-Brown v. Winfrey</i> , 717 F. 3d 295 (2d Cir. 2013)	12
<i>Kwikset Corp. v. Superior Court</i> , 51 Cal.4th 310 (2011)	48
<i>Kythera Biopharmaceuticals, Inc. v. Lithera, Inc.</i> , 998 F. Supp. 2d 890 (C.D. Cal. 2014)	43, 47
<i>Law Offices of Mathew Higbee v. Expungement Assistance Servs.</i> , 214 Cal. App. 4th 544 (2013)	47
<i>Lee Myles Auto Group, LLC v. Fiorillo</i> , 2010 WL 3466687 (S.D.N.Y. 2010)	38

TABLE OF AUTHORITIES
(continued)

<u>Cases:</u>	<u>Pages:</u>
<i>Life Alert Emergency Response, Inc. v. LifeWatch, Inc.</i> 601 F. App'x 469 (9th Cir. 2015)	41, 42
<i>LimeCoral, Ltd. v. Careerbuilder, LLC</i> , 2017 WL 961879, (N.D. Ill. 2017)	5
<i>Lockheed Martin Corp. v. Network Solutions, Inc.</i> , 194 F.3d 980 (9th Cir.1999)	17
<i>Louis Vuitton S A v Lee</i> 875 F.2d 584 (7th Cir.1989)	45
<i>Mfg. Automation & Software Sys., Inc. v. Hughes</i> , 2017 WL 1960633 (C.D. Cal. May 8, 2017)	21
<i>Microsoft Corp. v. Suncrest Enter.</i> , 2006 WL 1329881 (N.D. Cal. 2006)	38
<i>Midas Int'l Corp. v. Poulah Inv'rs, LLC</i> , 2016 WL 4532033 (D. Md. 2016)	38
<i>Minka Lighting, Inc. v. Bath Kitchen Décor, LLC</i> , 2015 WL 12743863 (C.D. Cal. 2015)	38
<i>mophie, Inc. v. Shah</i> , 2014 WL 10988347 (C.D. Cal. Nov. 12, 2014)	41
<i>NTD Architects v. Baker</i> , 950 F. Supp. 2d 1151 (S.D. Cal. 2013)	44
<i>Operation Tech., Inc. v. Cyme Int'l T & D Inc.</i> , 2016 WL 6246806 (C.D. Cal. Mar. 31, 2016)	15
<i>OTR Wheel Eng'g, Inc. v. W. Worldwide Servs., Inc.</i> , WL 11514767 (E.D. Wash. Aug. 1, 2014)	39
<i>Perfect 10, Inc. v. Amazon.com, Inc.</i> , 508 F.3d 1146 (9th Cir. 2007)	13, 17
<i>Perfect 10, Inc. v. Cybernet Ventures, Inc.</i> , 213 F. Supp. 2d 1146 (C.D. Cal. 2002)	13, 17
<i>Perfect 10, Inc. v. Visa Int'l Serv. Ass'n.</i> , 494 F.3d 788 (9th Cir. 2007)	13, 15, 16, 17, 42
<i>Philip Morris USA Inc. v. Liu</i> , 489 F. Supp. 2d 1119 (C.D. Cal. 2007)	41, 45, 48
<i>Phillip Morris USA Inc. v. Shalabi</i> , 352 F. Supp. 2d 1067 (C.D. Cal. 2004)	10, 13, 15, 19, 20

TABLE OF AUTHORITIES
(continued)

<u>Cases:</u>	<u>Pages:</u>
<i>Playvision Labs, Inc. v. Nintendo of Am., Inc.</i> , 2015 WL 12941892, (N.D. Cal. May 18, 2015)	10, 12
<i>S. California Darts Ass'n v. Zaffina</i> , 762 F.3d 921 (9th Cir. 2014)	4
<i>Sara Lee Corp. v. Am. Leather Prod., Inc.</i> , 1998 WL 433764 (N.D. Ill. 1998)	38
<i>Shapiro, Bernstein & Co. v. H. L. Green Co.</i> , 316 F.2d 304 (2d Cir. 1963)	40, 43
<i>SpyOptic, Inc. v. Alibaba.Com, Inc.</i> , 163 F. Supp. 3d 755 (C.D. Cal. 2015)	16
<i>Survivor Media, Inc. v. Survivor Prods.</i> , 406 F.3d 625 (9th Cir. 2005).....	37, 46
<i>Taylor v. Quall</i> , 471 F. Supp. 2d 1053 (C.D. Cal. 2007)	11
<i>TI Beverage Grp. Ltd. v. S.C. Cramele Recas SA</i> , 2014 WL 12013438 (C.D. Cal. 2014)	38
<i>Transgo, Inc. v. Ajac Transmission Parts Corp.</i> , 768 F.2d 1001 (9th Cir. 1985)	21, 22
<i>U.S. Liability Ins. Co. v. Haidinger-Hayes, Inc.</i> , 1 Cal.3d 586 (1970)	45
<i>Venhaus v. Shultz</i> , 155 Cal. App. 4th 1072 (2007)	49
<i>Wine Grp., LLC v. USA California Fengshiya Wine Grp., Ltd.</i> , 2011 WL 3189361 (C.D. Cal. 2011)	24
<i>Yeti hv Molly Ltd v Deckers Outdoor Corp.</i> 259 F.3d 1101 (9th Cir. 2001)	36
 <u>Statutes:</u>	
Cal. Bus. & Prof. Code § 17200	passim
15 U.S.C. § 1114.....	passim
15 U.S.C. § 1117.....	23, 24, 46, 50
15 U.S.C. § 1125	passim

TABLE OF AUTHORITIES
(continued)

<u>Rules:</u>	<u>Pages:</u>
Fed. R. Civ. P. 26	35
Fed. R. Civ. P. 37	35, 36
Fed. R. Evid. 801	37
<u>Other:</u>	
<i>McCarthy on Trademarks & Unfair Competition</i> § 25:10	12

I. PLAINTIFF REFLEX’S MOTION FOR SUMMARY JUDGMENT.

A. Introductions

1. Plaintiff’s Introduction

This case stems from the creation and dissemination of several phishing emails that were targeted at members of Plaintiff Reflex Media Inc.’s (“Plaintiff” or “Reflex”) dating website, www SeekingArrangement.com. The phishing emails state that there is a problem with the recipient’s SeekingArrangement.com membership account that requires them to “verify” their account by clicking on an embedded hyperlink that will supposedly take them to an “affiliate site.” The emails falsely purport to be from SeekingArrangement.com’s founder and Chief Executive Officer, Brandon Wade, and uses Reflex’s federally-registered SEEKING ARRANGEMENT trademark.

As explained below, if the recipient attempts to “verify” their account by clicking on the hyperlink and providing the requested personal information, they are actually registered for a “free” trial membership on one of Defendants’ competing, dating websites.

The phishing emails are false in every sense: they are not from Reflex, SeekingArrangement.com, or Brandon Wade; there is nothing wrong with the recipient’s SeekingArrangement.com account; and the embedded hyperlink does not take the recipient to an “affiliate site” of SeekingArrangement.com. Instead, the entire scheme is merely a ruse to dupe unwitting recipients into subscribing to the services of a competitor. This is precisely the type of harm that trademark and unfair competition law are designed to prevent and remedy.

The facts are undisputed—and in fact cannot be disputed because defendants refused to participate in discovery, including refusing to appear for depositions—and the law provides Reflex relief for Defendants’ unlawful conduct. On these bases, Reflex respectfully requests that the Court enter summary judgment in its favor on its claims arising under the Lanham Act for trademark infringement and

1 false designation of origin and its claim that Defendants have violated California's
2 Cal. Bus. & Prof. Code § 17200, which prohibits unfair competition.

3 **2. Defendants' Response to Plaintiff's Introduction**

4 It is hornbook law that the function of a summary judgment motion is to
5 pierce the allegations in the pleadings and test the sufficiency of the *evidence* that is
6 proffered to support them. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986)
7 (“[o]ne of the principal purposes of the summary judgment rule is to isolate and
8 dispose of factually unsupported claims or defenses”). The irony here is that
9 Plaintiff Reflex's own summary judgment motion reveals that Reflex has *no*
10 *evidence* to support a number of essential elements of the claims alleged in the
11 Complaint. Nor does Reflex have any evidence to support the *new* claims and
12 theories that Reflex now raises for the first time in its motion, but failed to allege in
13 its Complaint. The Court must not only deny Plaintiff Reflex's motion, but also
14 grant Defendants' motion, for the following reasons:

15 1. Plaintiff alleges a mass phishing scheme directed at members of its
16 “sugar daddy” dating website, but there is *no evidence* that Defendants FDS and
17 Sanchez had anything to do with this alleged scheme. Indeed, the undisputed
18 evidence is to the contrary. (D72, D73, D68, D84, D77; D71, D74, D75, D69, D70,
19 D85, D86; Sanchez Decl. ¶¶ 4-8, 12.)

20 2. Faced with this reality, Plaintiff now tries to proceed on theories of
21 vicarious and contributory infringement. That these distinct claims were not
22 pleaded in Plaintiff's Complaint is reason alone to deny Plaintiff summary
23 judgment; but more important, there is *no evidence* to support them. Plaintiff has
24 proffered no evidence that Defendants FDS and Sanchez had the right and ability to
25 supervise the infringing conduct, sufficient to support a theory of vicarious
26 infringement. And Plaintiff has proffered no evidence that Defendants FDS and
27 Sanchez intentionally induced a third party to infringe, or otherwise exerted control
28 over a third party infringer, sufficient to support a theory of contributory

1 infringement. The principal case Plaintiff cites in support of its contributory
2 infringement theory, *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.2d 1229 (10th
3 Cir. 2013), involved different facts where there was evidence to support these
4 essential elements.

5 3. Plaintiff also fails to establish the essential element of likelihood of
6 confusion. Given the unsophisticated nature of the alleged phishing emails, it is
7 unsurprising that Plaintiff has failed to identify *a single consumer* who was actually
8 confused, let alone duped into providing his credit card information. Instead,
9 Plaintiff wrongly asserts that confusion is presumed because this is a case of
10 trademark “counterfeiting.” Not so. *Trademark counterfeiting* is a distinct claim
11 from traditional trademark infringement. It was not alleged in the Complaint, and
12 Plaintiff’s evidence is insufficient to satisfy the stricter evidentiary standard
13 required to support a claim for trademark counterfeiting.

14 4. Plaintiff also fails to establish the other essential elements of its
15 ownership of the mark and Defendants’ use – elements for which Reflex
16 indisputably has the burden of proof, as a plaintiff.

17 The simple truth is that after having had a year to use the discovery process
18 to procure evidence in support of its allegations, Plaintiff has come up short.
19 Instead, Plaintiff now resorts to making misleading claims that Defendants “refused
20 to participate in discovery.” These claims are false (*see* Supp. Metzidis-Drennan
21 Decl. ¶¶ 10-38); but more important, they are immaterial to the summary judgment
22 motions before the Court.

23 Plaintiff also misleads this Court about the nature of the evidence it has
24 procured. While Plaintiff’s motion attaches examples of “Verification Pages” that
25 refer to Defendant FDS’s “Find Your True Soulmate” website and four other FDS
26 websites (Plaintiff’s Exs. 7-15), Plaintiff says nothing about the scope of documents
27 it produced in discovery: hundreds upon hundreds of “Verification Pages” that
28 refer to websites *other* than FDS’s websites. Of the 311 websites referred to in

1 Plaintiffs' document production, only 5 are FDS websites. (Sanchez Decl. ¶ 10;
2 Defs.' Ex. 4; Supp. Metzidis-Drennan Decl. ¶¶ 7-9.) Yet this is not at all the
3 impression created by the facts presented in Plaintiff's motion.

4 For all these reasons, *Defendants'* motion for summary judgment should be
5 granted, and Plaintiff Reflex's motion must be denied.

6 **B. Argument**

7 **1. Reflex is Entitled to Summary Judgment on its Trademark**
8 **Infringement Claim.**

9 A plaintiff must prove three elements to prevail on a trademark infringement
10 cause of action under the Lanham Act, 15 U.S.C. § 1114: "(1) ownership of a valid
11 trademark; (2) use of the mark without its consent; and (3) that such use is likely to
12 cause confusion." *JL Audio Inc. v. Kazi*, No. 516CV00785CASJEM, 2017 WL
13 4179875, at *4 (C.D. Cal. Sept. 18, 2017); *see also S. California Darts Ass'n v.*
14 *Zaffina*, 762 F.3d 921, 929 (9th Cir. 2014).

15 **a. Reflex has Ownership of a Valid Trademark.**

16 The SEEKING ARRANGEMENT trademark was registered with the United
17 States Patent and Trademark Office ("USPTO") on February 5, 2008, and assigned
18 Registration No. 3,377,772. (Ex. 1; Wey Declaration at ¶ 2; *see also* Plaintiff's
19 Undisputed Fact (hereinafter, "P") 1.) Reflex holds an exclusive, worldwide license
20 to use the SEEKING ARRANGEMENT trademark, which includes the right to sue
21 to enforce its rights in the trademark. (Wey Declaration at ¶ 3; P 2-3). Accordingly,
22 Reflex has ownership over the SEEKING ARRANGEMENT trademark and
23 standing to enforce its rights in the mark. *See Halcyon Horizons, Inc. v. Delphi*
24 *Behavioral Health Grp., LLC*, No. 17-CV-00756-JST, 2017 WL 1956997, at *3
25 (N.D. Cal. May 11, 2017) ("[M]ost district courts in [the Ninth] [C]ircuit have
26 concluded that an exclusive licensee of a federal trademark can have standing to sue
27 for trademark infringement under Section 32 of the Lanham Act.").

**b. Defendants’ Response to Plaintiff’s Section I.B.1.a and
Objections to Evidence.**

Plaintiff Reflex does *not* own the trademark SEEKING ARRANGMENT.
That trademark is owned by Clover8 Investments PTE, Ltd. (Plaintiff’s Ex. 1.)

Reflex claims that it is the exclusive licensee of that trademark but offers no
admissible evidence to that effect. Reflex’s sole evidence is the testimony of its
owner that Clover8 “has granted Plaintiff Reflex Media an exclusive, worldwide
license to use the SEEKING ARRANGEMENT mark including the right to sue to
enforce and defend its rights in the trademark.” (Wey Decl., ¶ 3.)

Wey’s testimony is inadmissible. To the extent this supposed exclusive
licensing agreement was in writing, his testimony is inadmissible under FRE 1002;
the written agreement is not an exhibit to this motion nor disclosed with Reflex’s
Rule 26 disclosures. (Supp. Metzidis-Drennan Decl. ¶¶ 5-6.)

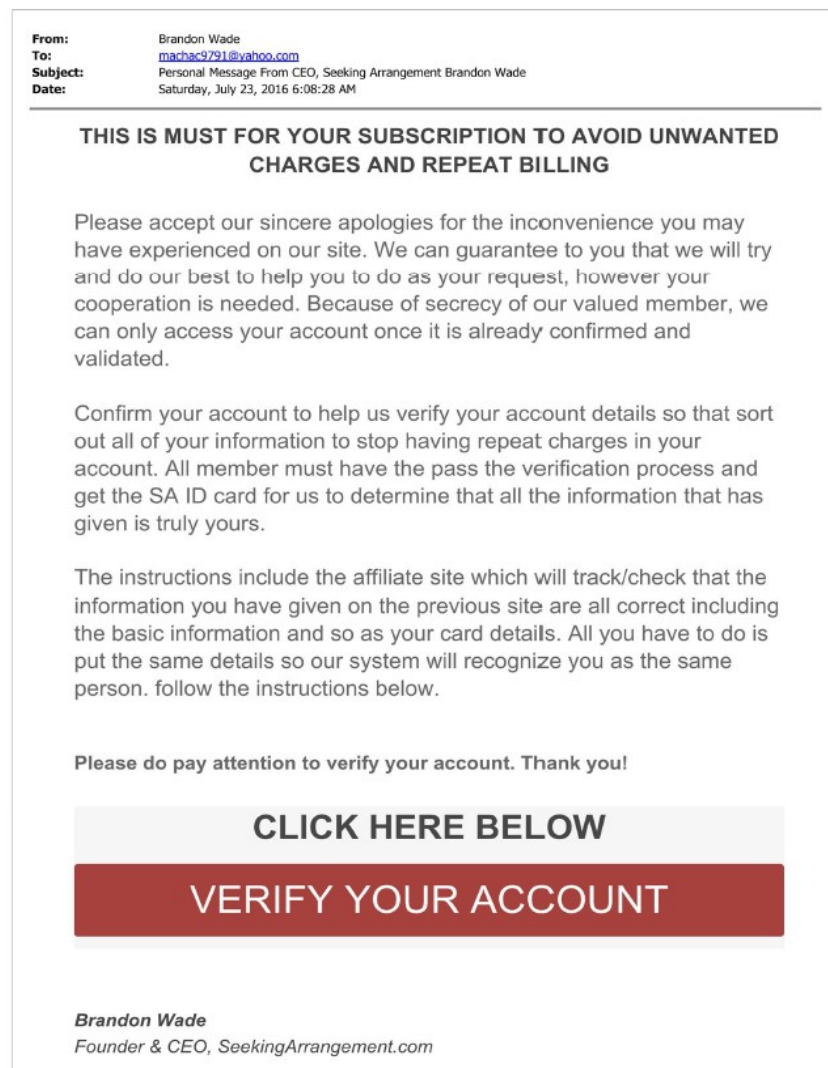
To the extent this supposed agreement was made orally, Wey’s testimony
lacks foundation, is conclusory, and constitutes inadmissible hearsay. Wey did not
provide any foundation that he negotiated the contract or was present when it was
formed, nor has he testified to the terms (other than in conclusory fashion). *See,*
e.g., Geo M. Martin Co. v. Alliance Machine Sys. Int’l, LLC, 2008 WL 1946925, at
*3 (N.D. Cal. 2008) (holding that testimony of oral exclusive license is
inadmissible without evidence that witness was present at the contract’s creation);
LimeCoral, Ltd. v. Careerbuilder, LLC, 2017 WL 961879, at *4 (N.D. Ill. 2017)
(party cannot create dispute of material fact as to existence of oral contract with
“vague assertions . . . without any specificity as to when or where or the precise
terms of the alleged agreements”).

**c. Defendants used the SEEKING ARRANGEMENT
Trademark Without Consent.**

As described above, this case arises from the creation and dissemination of at
least five phishing emails that were targeted at customers of Reflex’s website,

1 www.SeekingArrangement.com. (Ex. 2-6; P4-5). The phishing emails purport to be
2 from SeekingArrangement.com's founder and Chief Executive Officer, Brandon
3 Wade, and repeatedly use the SEEKING ARRANGEMENT trademark (the
4 "Phishing Emails"). (Ex. 2-6; P6-P9.) For example, the Phishing Email depicted
5 below in Figure 1 appears as if originates from "Brandon Wade." This is reinforced
6 through the subject line, which reads: "Personal Message from CEO, Seeking
7 Arrangement Brandon Wade."

8 *Figure 1. FDS Solutions Phishing Email*



26 The Phishing Emails demand the recipient to respond and create a sense of
27 urgency by representing that the recipient needs to "verify" their
28

1 SeekingArrangement.com account by clicking on a hyperlink contained in the
2 Phishing Emails. (Ex. 2-5; P10). As the image above shows, this email begins:
3 **“THIS IS A MUST FOR YOUR SUBSCRIPTION TO AVOID UNWANTED**
4 **CHARGES AND REPEAT BILLING.”** The other Phishing Emails are similarly
5 scripted to create a sense of urgency and demand a call to action. For example, a
6 Phishing Email includes statements like: “We still haven’t found any update in your
7 account,” and “Are you working on it?” (Ex. 4; see Ex. 2-3; 5-6 P11-13). In each
8 case, the Phishing Emails provide a hyperlink where the recipient can supposedly
9 “verify” their SeekingArrangement.com account or claim a free SA (short for
10 Seeking Arrangement) ID card. (Ex. 2-6; P14-15). Clicking on the “VERIFY
11 HERE” or “VERIFY YOUR ACCOUNT” hyperlinks will direct the recipient to a
12 website bearing the title, “VERIFICATION PROCESS” where they are asked for
13 personal identifying and credit card information. (Ex. 2, 5; Schaeffer Decl. at ¶¶
14 16-17; P16-17). An example of this “verification” page is depicted below in
15 Figure 2.


16 *Figure 2. Redirect “Verification” Page*
17
18
19
20
21
22
23
24
25
26
27
28

VERIFICATION PROCESS

Fill this form out for quick access:

First Name: <input type="text" value="First Name"/>	Last Name: <input type="text" value="Last Name"/>
Country: <input type="text" value="United States"/>	Zip: <input type="text" value="Zip"/>
Card Number: <input type="text" value="Card Number"/>	
Expiration Date: <input type="text" value="01"/>	<input type="text" value="19"/>
<div style="text-align: right;">CVV2/CVC2:?</div> <input type="text" value="CVV"/>	

Click Here For Access



By pressing "Click Here For Access", I certify that I have read and agree to the complete terms of membership and billing and that the card entered above is my credit card. Your access to LocalSexFriends includes a 2 day free trial promo to Find Your True Soulmate. If you choose to remain a member of Find Your True Soulmate beyond the trial period, your membership will renew at thirty nine dollars and ninety nine cents. Your membership to LocalSexFriends will be Free for Lifetime. You will also receive a free membership to Uberhorny.

Your IP Address has been logged for fraud protection.
 Charges made to your credit card will appear under "fndrtsmt.com (866)873-7541", operated by FDS Solutions Limited, an eCommerce Merchant located in the United Kingdom.

In very fine print—and in a hard-to-read gray font printed on a gray background—this webpage reveals that the recipient’s personal information will not be used to “verify” their SeekingArrangement.com account, but rather, will be used to register them for a dating website owned by Defendants. (Ex. 9 (copy of figure 2); Ex. 17 (Response to Interrogatory No. 9), 18 (identifies FDS Solutions Limited at bottom of website); P16-20). In this example, the recipient will be registered for a “free trial” of Find Your True Soulmate—a website owned and operated by Defendants and available at www.findyourtruesoulmate.com. (Ex. 9; Ex. 17; *see* Ex. 18 (Response to Interrogatory No. 9); P16-20). In other instances, the recipient can be registered for one of Defendants’ other websites, including:

1 • www.kinkymatchdating.com • www.traditionaldatingsite.com,
2 • www.infinitelovematches.com • www.findtherightoneforyou.com.
3 (Ex. 7-8, 10-15, 17 (Response to Interrogatory 9), 19-22; P21-29). Together with
4 www.findyourtruesoulmate.com, these websites are referred to herein as the
5 “Websites” or “Defendants’ Websites.”

6 Simply stated, the Phishing Emails are false in every sense: they are not from
7 or in any way affiliated with SEEKING ARRANGEMENT or Reflex, and the
8 recipient’s SeekingArrangement.com account does not need to be verified. Reflex
9 did not give Defendants, or anyone else, permission to use its SEEKING
10 ARRANGEMENT mark for this or any other purpose, especially where—as here—
11 the (mis)use of the mark serves to cause SeekingArrangement.com’s members to
12 register and subscribe to the services of a competitor, i.e., Defendants. (Wey Decl.
13 at ¶ 9; P30).

14 **d. Defendants’ Response to Plaintiff’s Section I.B.1.c and**
15 **Objections to Evidence.**

16 As set forth in Sections II.C.1.a and II.C.2.a of Defendants’ motion for
17 summary judgment, Plaintiffs have not only failed to prove that Defendants ever
18 used the SEEKING ARRANGEMENT trademark, but, to the contrary, the evidence
19 is undisputed that Defendants did not. (D72, D73, D68, D84, D77; D71, D74,
20 D75, D69, D70, D85, D86; Sanchez Decl., ¶¶ 4-8, 12.)

21 In addition, Defendants object to Plaintiff’s Exhibits 2 through 6, the five e-
22 mails on which Plaintiff basis its claims, as unauthenticated. Plaintiff offers no
23 testimony from any person who claims to have received the e-mails (let alone
24 anybody who sent the e-mails). There is no evidence that the e-mails are what
25 Plaintiff purports them to be. FRE 901.

e. **Use of the Counterfeit SEEKING ARRANGEMENT
Trademark is Likely to Cause Confusion.**

In the Ninth Circuit, counterfeit trademarks are deemed to be inherently confusing. *Phillip Morris USA Inc. v. Shalabi*, 352 F. Supp. 2d 1067, 1073 (C.D. Cal. 2004). A counterfeit mark under the Lanham Act is defined as “a spurious mark which is identical with, or substantially indistinguishable from, a registered mark.”¹⁵ U.S.C. § 1127; *Playvision Labs, Inc. v. Nintendo of Am., Inc.*, No. C14-05365 CRB, 2015 WL 12941892, at *1 (N.D. Cal. May 18, 2015).

Here, the Phishing Emails use spurious marks that are identical to, or substantially indistinguishable¹ from Reflex’s SEEKING ARRANGEMENT trademark. Indeed, each Phishing Email purports to be from “CEO **Seeking Arrangement** Brandon Wade,” “Brandon Wade Founder & CEO, **SeekingArrangement.com**” or “Brandon Wade CEO, **SeekingArrangement.**” (Ex. 2-6; P4-P9 (emphasis added)). Accordingly, Defendants’ counterfeit use of Reflex’s SEEKING ARRANGEMENT trademark is likely to cause confusion.

Based on the foregoing, Reflex is entitled to summary judgment on its trademark infringement claim because: (1) it is the owner of a valid copyright, (2) it did not authorize Defendants to use its SEEKING ARRANGEMENT mark for any purpose, and (3) Defendants’ use of counterfeit SEEKING ARRANGEMENT marks in the Phishing Emails is likely to cause confusion, especially where the counterfeit emails purport to be from SeekingArrangement.com’s founder and Chief Executive Officer, identify Defendants’ Websites as “affiliates” of Reflex’s SeekingArrangement.com website, and where Defendants offer competing services (*i.e.* dating/matchmaking) through their websites.

¹ In the context of federal trademark law, the “dot-com” suffix is generally disregarded. *See Advertise.com, Inc. v. AOL Advertising, Inc.*, 616 F.3d 974 (9th Cir. 2010).

f. **Defendants' Response to Plaintiff's Section I.B.1.e.**

Reflex argues that it need not prove likelihood of confusion through the usual analysis because, it claims, this is a case of trademark counterfeiting and confusion is presumed. But Reflex's Complaint does not allege a claim of trademark counterfeiting or allege that the mark supposedly used by Defendants was a "counterfeit."

Trademark counterfeiting is a separate cause of action from trademark infringement. *See, e.g., Coach, Inc. v. Sac a Main*, 2012 WL 5464347, at *2-*4 (E.D. Cal. 2012) (separately analyzing trademark infringement and trademark counterfeiting claim). Reflex cannot raise this claim for the first time on a motion for summary judgment. *See Gutowitz v. Transamerica Life Ins. Co.*, 126 F. Supp. 3d 1128, 1152 n.78 (C.D. Cal. 2015) (refusing to allow Plaintiff to raise new theory of bad faith to support breach of implied covenant claim, noting "plaintiffs cannot raise the theory for the first time in their [summary judgment] opposition"); *Taylor v. Quall*, 471 F. Supp. 2d 1053, 1058 n.3 (C.D. Cal. 2007) (holding that Plaintiff could not support Fair Debt Collection Practices Act claim with evidence of false representations not alleged in the complaint as such claims are "not appropriately raised for the first time in opposition to a motion for summary judgment"); *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1291-94 (9th Cir. 2000) (affirming trial court decision refusing to allow Plaintiff to proceed on disparate impact theory for ADA claim on summary judgment motion having not alleged that theory in its complaint).

In any event, Reflex has not proven, and cannot prove, that the use of the phrase "SEEKING ARRANGEMENT" in the five phishing e-mails on which it bases its claim is a "counterfeit" use. The Lanham Act defines a counterfeit mark as one which "is identical with, or substantially indistinguishable from, a registered mark." 15 U.S.C. § 1127. This "requires a closer degree of similarity than is

1 required for traditional trademark infringement or unfair competition.”

2 T. McCarthy, *McCarthy on Trademarks & Unfair Competition* § 25:10 at 25-33.

3 Courts have held that even if the wording of the marks were identical, the
4 marks are *not* “substantially indistinguishable” if the font, color, and capitalization
5 differs. *See Kelly-Brown v. Winfrey*, 717 F. 3d 295, 314-15 (2d Cir. 2013)
6 (dismissing Lanham Act counterfeiting claim because font and color of marks are
7 different though words are the same); *Playvision Labs, Inc. v. Nintendo of Am., Inc.*,
8 2015 WL 12941892, at *1 (N.D. Cal. 2015) (dismissing trademark counterfeiting
9 claim because, among other things, marks that use different colors and lettering are
10 not virtually identical or substantially indistinguishable).

11 Plaintiff does not submit any evidence of how it uses the SEEKING
12 ARRANGEMENT mark in commerce, and so there is no way the Court could
13 analyze whether the use in the alleged phishing e-mails is a *counterfeit* use.
14 Defendants, however, provide a printout of Plaintiff’s website, and it’s easy to see
15 why Plaintiff didn’t want the Court to see how it uses the mark in commerce.
16 Plaintiff uses a very particular font and red and white coloring. (Defs.’ Ex. 13 to
17 Supp. Metzidis-Drennan Decl.) That is completely different than the way in which
18 the mark is used on the five alleged phishing e-mails proffered by Plaintiff: in
19 those e-mails, the mark is used in connection with other words (.com and CEO), in
20 a different font, and without the red and white color. (Plaintiff’s Exs. 2-6.)

21 Therefore, confusion is not presumed in this case and Plaintiff must show
22 likelihood of confusion through the usual analysis of the *Sleekcraft* factors. *AMC,*
23 *Inc. v. Sleekcraft Boats*, 599 F. 2d 341 (9th Cir. 1979). Plaintiff doesn’t analyze
24 these factors at all, and offers no evidence on a number of them, including actual
25 confusion, strength of mark, marketing channels, type of goods and degree of care,
26 etc. Therefore, Plaintiff has failed to present any evidence of likelihood of
27 confusion and for that reason alone, its motion must fail.

28

g. Defendants Can Also Be Held Liable Under Claims of Contributory and Vicarious Trademark Infringement.

(i) Contributory Trademark Infringement.

Even if Defendants seek to avoid liability by denying that they individually typed and sent the Phishing Emails, trademark infringement is a strict liability offense and Defendants can be held contributorily liable. *Phillip Morris USA*, 352 F.Supp.2d at 1073–74 (collecting cases explaining that strict liability is imposed for violations of the Lanham Act and Cal. Bus. & Prof. Code § 17200).

Under Ninth Circuit law, a person who, “with knowledge of the infringing activity, induces, causes or materially contributes to the infringing conduct of another, may be held liable as a ‘contributory’ infringer,” and knowledge of infringement will be found where a defendant is willfully blind. *See Perfect 10, Inc. v. Amazon.com, Inc.* (hereinafter, “*Amazon*”), 508 F.3d 1146, 1171 (9th Cir. 2007)(citing *Gershwin Publishing Corp. v. Columbia Artists Management, Inc.*, 443 F.2d 1159, 1162 (2d Cir.1971); *see Perfect 10, Inc. v. Cybernet Ventures, Inc.* (hereinafter, “*Cybernet*”), 213 F. Supp. 2d 1146, 1189 (C.D. Cal. 2002) (citing *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 265 (9th Cir. 1996); *see Perfect 10, Inc. v. Visa Int’l Serv. Ass’n* (hereinafter, “*Visa*”), 494 F.3d 788, 807 (9th Cir. 2007) (citing *Inwood Labs., Inc. v. Ives Labs., Inc.*, 456 U.S. 844, 855 (1982)); *see I-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1249 (10th Cir. 2013).

Moreover, courts do not require a showing that a principal has monitored the instrumentality of infringement where they are put on notice that an agent or subagent is infringing on a trademark, even where the principal is not reasonably sure which agent or subagent is infringing on a trademark. *See 1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1252 (10th Cir. 2013). Once the principal becomes aware that one of its agents is infringing upon a trademark, it is incumbent upon them to investigate and stop such infringement. *Id.* (holding that a reasonable jury could find contributory infringement where principal was served with a

1 complaint and screenshot of an infringing ad and did not take corrective action to
2 stop the infringement, including sending an “email blast to its affiliates” informing
3 them to stop).

4 Here, Defendants were served with the Complaint on February 1, 2017,
5 including a copy of one of the Phishing Emails. (*See* Ex. 23-28; P 31-35). Copies of
6 the four other phishing emails were provided to Defendants on September 5, 2017.
7 (*See* Ex. 2-6 (copies of Phishing Emails) and 29 (Reflex Media's First Supplemental
8 Rule 26 Disclosures on September 5, 2017); P36). More than a month later, in
9 October 2017, at least one of the Phishing Emails still contained active hyperlinks
10 that would lead the recipient to register for Defendants’ Websites. (*See* Ex. 5 (copy
11 of Phishing Email), 9-15 (copies of “verification” webpages); Schaeffer Decl. at ¶¶
12 10-16; P39-45). In fact, there is no evidence Defendants have taken any corrective
13 action in this case by, for example, sending notice to their affiliates and/or
14 attempting to terminate the websites tied to the Phishing Emails. (*See* Ex. 30; P46).
15 Moreover, Defendants refused to participate in the discovery process by sitting for
16 depositions. (Ex. 31; P47). Accordingly, even where Defendants may disclaim
17 responsibility for personally creating the Phishing Emails and deny knowing the
18 actions of their agents², by failing to take any corrective measures, Defendants are
19 contributorily liable for infringing Reflex’s SEEKING ARRANGEMENT
20 trademark because Defendants cannot claim they were unaware of the conduct.

21 **(ii) Vicarious Liability for Trademark Infringement.**

22 To prevail on a claim of “[v]icarious liability for trademark infringement
23 requires a finding that the defendant and the infringer have an apparent or actual
24 partnership, have authority to bind one another in transactions with third parties or
25 exercise joint ownership or control over the infringing product. *Visa*, 494 F.3d at
26 807 (quoting *Hard Rock Café Licensing Corp. v. Concession Servs., Inc.*, 955 F.2d
27 1143, 1150 (7th Cir.1992)) (internal quotations omitted). “It is well established that

28 ² See discussion in Section I.B.1.g(ii), *infra*.

1 traditional vicarious liability rules ordinarily make principals or employers
2 vicariously liable for acts of their agents” *Operation Tech., Inc. v. Cyme Int’l T & D*
3 *Inc.*, No. SACV1400999JVSDFMX, 2016 WL 6246806, at *4 (C.D. Cal. Mar. 31,
4 2016) (citing *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.3d 1229, 1249 (10th Cir.
5 2013)).

6 Here, the infringing product is a combination of the Phishing Emails and
7 Defendants’ Websites. When asked about the “origin” of the Phishing Emails,
8 Defendants responded, in part: “To the extent “DEFENDANTS” is defined to mean
9 former employees, agents, and attorneys for FDS and Sanchez, [Defendants] have
10 no knowledge of what information, if any, those persons possess regarding the
11 origin of the PHISHING EMAIL.” (Ex. 28 (Response to Interrogatory No. 10);
12 P48). Claiming ignorance of your employees and agents’ actions, however, is no
13 defense. As cited above, trademark infringement is a strict liability offense and the
14 Phishing Emails were clearly created to benefit Defendants’ Websites by targeting
15 known consumers of dating website services (*i.e.*, SeekingArrangement.com’s
16 customers) for the purpose of unknowingly registering them to become members of
17 Defendants’ Websites. *Phillip Morris USA*, 352 F.Supp.2d at 1073–74.
18 Accordingly, Defendants cannot escape liability by throwing their hands in the air
19 and saying they are unsure which of their agents or employees may have typed the
20 Phishing Emails and pressed “send” on their keyboard. As the employer,
21 Defendants are vicariously liable for the actions of their agents and employees. *See*
22 *Visa*, 494 F.3d at 807.

23 **h. Defendants’ Response to Plaintiff’s Section I.B.1.g and**
24 **Objections to Evidence.**

25 Reflex argues that the facts support claims for vicarious and contributory
26 trademark infringement. But that argument fails for multiple reasons.

27 First, Reflex’s Complaint fails to allege claims for vicarious or contributory
28 infringement, nor does the Complaint allege any of the facts underlying these

1 claims. As noted, Reflex cannot raise claims for the first time on a motion for
2 summary judgment. *See Gutowitz*, 126 F. Supp. 3d at 1152 n.78.

3 Here, the Complaint alleges only a claim of direct trademark infringement
4 and not a claim for vicarious or contributory trademark infringement. *See, e.g.,*
5 *SpyOptic, Inc. v. Alibaba.Com, Inc.*, 163 F. Supp. 3d 755, 764-66 (C.D. Cal. 2015)
6 (treating contributory infringement claim as separate claim from direct
7 infringement). Moreover, the Complaint alleges none of the facts that Reflex now
8 claims constitute vicarious or contributory trademark infringement.

9 Second, even if those claims were properly alleged, there are not any facts –
10 let alone undisputed facts – to support those theories.

11 To establish a claim for vicarious copyright infringement, Reflex must prove
12 that Defendants have (1) the right and ability to supervise the infringing conduct
13 and (2) a direct financial interest in the infringing activity. *Perfect 10, Inc. v. Visa*
14 *Int’l Serv. Ass’n*, 494 F.3d 788, 802 (9th Cir. 2007). Reflex has no facts
15 whatsoever to establish either prong.

16 There is *no* evidence that either FDS or Sanchez had the right and ability to
17 supervise the infringing conduct. FDS and Sanchez indisputably have no idea who
18 engaged in the infringing conduct, and it’s fairly clear that Reflex doesn’t know
19 either! (D72, D73, D68, D84, D77; D71, D74, D75, D69, D70, D85, D86; Sanchez
20 Decl. ¶¶ 4-8, 12.) So, clearly, FDS and Sanchez can’t have the right and ability to
21 supervise the conduct of somebody they do not know.

22 Nor is there any evidence that FDS or Sanchez has any direct financial
23 interest in the infringing activity. Reflex submits a few screenshots of “Verification
24 Pages” that include FDS’s name and state that, on filling out the form, a consumer
25 will subscribe to FDS’s website and that his or her credit card will be processed by
26 FDS. *But there is no evidence that any of the statements on these Verification*
27 *Pages is true!* Reflex has produced *not a shred of evidence* that filling in credit
28 card information would result in subscribing to an FDS website or any monies ever

1 ending up at FDS. And, indeed, Defendants did not authorize anybody to put
2 FDS's name or website on these Verification Pages and has no knowledge that any
3 consumer has subscribed to its websites from these pages. (Sanchez Decl., ¶¶ 7-8.)
4 Therefore, on the undisputed facts, Defendants are not liable for vicarious
5 trademark infringement.

6 Nor can Plaintiff prove contributory trademark infringement. To prove such
7 a claim, Reflex must prove that Defendants (1) "intentionally induced" the primary
8 infringer to infringe, or (2) continued to supply an infringing product to an infringer
9 with knowledge that the infringer is mislabeling the particular product supplied.
10 *Perfect 10, Inc.*, 494 F.3d at 807. "When the alleged direct infringer supplies a
11 service rather than a product, under the second prong of this test, the court must
12 'consider the extent of control exercised by the defendant over the third party's
13 means of infringement.'" *Id.* (quoting *Lockheed Martin Corp. v. Network Solutions,*
14 *Inc.*, 194 F.3d 980, 984 (9th Cir.1999)). To establish liability under this second
15 prong, there must be "[d]irect control and monitoring of the instrumentality used by
16 a third party to infringe the plaintiff's mark." *Id.*

17 Reflex obviously cannot prove liability under the first prong of the *Perfect 10*
18 test because it has no evidence whatsoever that either of the Defendants
19 intentionally induced anybody to send the phishing e-mails at issue. So it focuses
20 on the second prong and relies upon a Tenth Circuit case that, in reality, makes
21 clear why Reflex's motion should be denied and Defendants' motion granted.

22 Reflex relies on *1-800 Contacts, Inc. v. Lens.com, Inc.*, 722 F.2d 1229 (10th
23 Cir. 2013), a trademark infringement dispute between competitors involving use of
24 Google "AdWords." The evidence in this case showed that Defendant Lens.com
25 entered into contracts through which affiliates (in this case, more than 10,000
26 affiliates) were signed up to promote Lens.com. *Id.* at 1236. Discovery in the case
27 further identified two specific affiliates of Lens.com who had bid on the keyword
28 "1800Contacts" (Plaintiff's trademark), used that keyword to advertise Lens.com,

1 and purchased ads for Lens.com containing Plaintiff's mark. *Id.* at 1237.

2 Discovery also revealed that Lens.com had effectively communicated with its
3 affiliates in the past to stop other infringing conduct. *Id.* at 1252.

4 Having learned this information in discovery, plaintiff 1-800-Contacts
5 amended its complaint – which previously alleged only direct infringement – to add
6 claims for vicarious and contributory infringement. *Id.* at 1237. The infringement
7 continued for three months after the amended complaint was filed, until Lens.com
8 contacted its affiliates and asked them to stop. *Id.* at 1252.

9 The Tenth Circuit reversed the district court's summary judgment on
10 contributory infringement, finding that "a rational juror could find that Lens.com
11 knew that at least one of its affiliates was using 1-800's service mark in its ads yet
12 did not make reasonable efforts to halt the affiliate's practice." *Id.* at 1252.

13 That *1-800-Contacts* is distinguishable from this case cannot reasonably be
14 disputed for at least the following reasons:

- 15 • In *1-800-Contacts*, discovery showed exactly who the direct infringer was
16 and that the infringer had a contractual relationship with the Defendant.
17 *Reflex has no idea who the infringer is here and there is no evidence of*
18 *any relationship between the infringer and FDS (let alone Sanchez).*
- 19 • There was evidence in *1-800-Contacts* that Lens.com had the ability to
20 contact its affiliates and cause them to stop any infringing conduct.
21 Plaintiff offers no evidence that FDS has affiliates or that, if it did, it has
22 any ability to contact or control them.
- 23 • While the infringing activity in *1-800 Contacts* continued for months after
24 the complaint (and amended complaint) were filed, there is no evidence
25 that any phishing e-mails were sent after the five e-mails that Reflex has
26 identified here, all of which are dated in June or July 2016. Therefore,
27 Reflex cannot argue, as 1-800-Contacts argued in its case, that Defendants
28 "failed to stop" the infringing activity. Based on the evidence Reflex has

presented, the infringing activity stopped long before Reflex filed its Complaint.

- *1-800-Contacts* (which, like Reflex here, had filed a complaint alleging only *direct* trademark infringement), upon learning in discovery the identity of the infringers and their relationship to Lens.com, *amended its complaint to allege expressly vicarious and contributory infringement, and further allege the facts that supported those theories*. Reflex here has never amended its complaint to allege these new claims or the theories underlying them.

There is no evidence, then, sufficient to show that either of the Defendants is liable for contributory trademark infringement.

2. Reflex is Entitled to Summary Judgment on its False Designation of Origin Claim.

“To prevail on a claim for false designation of origin under 15 U.S.C. § 1125(a), a plaintiff must allege the defendant's use of its mark is likely to cause confusion, deception or mistake as to ‘the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person.’” *Gryphon Mobile Elecs., LLC v. Brookstone, Inc.*, No. SACV152056DOCJCGX, 2016 WL 7637987, at *4 (C.D. Cal. July 12, 2016) (quoting 15 U.S.C. § 1125(a)(1)(A)). Liability is established under § 1125(a)(1) where a plaintiff shows “(1) it owns a valid and protectable interest/trademark . . . [and] (2) [that the] Defendants subsequently and without authorization used a similar mark likely to cause consumer confusion, deception or mistake.” *Phillip Morris USA Inc.*, 352 F.Supp.2d at 1072 (citations omitted).

As described above in Section I.B.1.a, *supra*, Reflex owns a valid and protectable interest in the SEEKING ARRANGEMENT trademark and Defendants subsequently and without authorization used a counterfeit SEEKING

1 ARRANGEMENT trademark in the Phishing Emails. The use of counterfeit
2 trademarks—as in this case—is per se confusing. *Phillip Morris USA Inc.*, 352
3 F.Supp.2d at 1073 (stating that “counterfeit marks are inherently confusing”)
4 (citations omitted). This is especially true where the counterfeit mark is used in
5 phishing emails that purport to be from SeekingArrangement.com’s founder and
6 Chief Executive Officer and hold Defendants’ Websites out as “affiliate sites” to
7 Reflex’s SeekingArrangement.com. Accordingly, Reflex is entitled to summary
8 judgment on its false designation of origin claim under 15 U.S.C. § 1125(a).

9 **3. Defendants’ Response to Plaintiff’s Section I.B.2.**

10 As set forth in Sections II.C.1.c and II.C.2.c of Defendants’ motion, for the
11 same reasons Plaintiff cannot prove trademark infringement, it cannot prove false
12 designation of origin.

13 **4. Reflex is Entitled to Summary Judgment on its Unfair**
14 **Competition Claim under Cal. Bus. & Prof. Code § 17200 et**
15 **seq.**

16 To prevail on a claim of unfair competition under California law, a plaintiff
17 must show that the defendant has engaged in any “unlawful, unfair or fraudulent
18 business act or practice [or] unfair, deceptive, untrue or misleading advertising.”
19 Cal. Bus. & Prof. Code § 17200. It is well-settled that a defendant will be liable
20 under § 17200 if a plaintiff demonstrates that the defendant is also liable for federal
21 trademark infringement (15 U.S.C. § 1114) or unfair competition (15 U.S.C. §
22 1125) under the Lanham Act. *See Phillip Morris USA Inc.*, 352 F.Supp.2d at 1072–
23 73 (noting that once liability is established under 15 U.S.C. §§ 1114 or 1125(a), the
24 plaintiff will also be entitled to summary judgment on § 17200 claims) (citing
25 *Century 21 Real Estate Corp. v. Magee*, 1991 WL 318797, 1991 U.S. Dist. LEXIS
26 14611, at *7–8 (C.D. Cal. 1991).

27 As explained above in Sections I.B.1 and I.B.2, *supra*, Defendants’ conduct
28 is unlawful under the §§ 1114 and 1125 of the Lanham Act. Accordingly, Reflex is

1 also entitled to summary judgment on its unfair competition claim under Cal. Bus.
2 & Prof. Code § 17200.

3 **5. Defendants' Response to Plaintiff's Section I.B.4.**

4 As set forth in Sections II.C.1.e and II.C.2.e of Defendants' motion, Plaintiff
5 lacks standing to bring a claim under Section 17200 and has failed to prove, and
6 cannot prove, a violation of that statute.

7 **6. Defendant Sanchez is Personally Liable for the Conduct of**
8 **FDS Solutions.**

9 “A corporate officer or director is, in general, personally liable for all torts
10 which he authorizes or directs or in which he participates, notwithstanding that he
11 acted as an agent of the corporation and not on his own behalf.” *Transgo, Inc. v.*
12 *Ajac Transmission Parts Corp.*, 768 F.2d 1001, 1021 (9th Cir. 1985) (internal
13 quotations omitted); *see also Int'l Mfg. Co. v. Landon, Inc.*, 336 F.2d 723, 728 (9th
14 Cir. 1964) (finding sole owner and officer personally liable for infringement where
15 he “was in personal control of [the company] and acted as its guiding spirit and the
16 active directing hand in full charge of its operations”). “This principle applies
17 regardless of the piercing of the corporate veil,” *Chase Inv. Servs. Corp. v. Law*
18 *Offices of Jon Divens & Assocs., LLC*, 748 F. Supp. 2d 1145, 1182 (C.D. Cal.
19 2010), *aff'd*, 491 F. App'x 793 (9th Cir. 2012), and applies “in trademark
20 infringement and unfair trade practices cases.” *Mfg. Automation & Software Sys.,*
21 *Inc. v. Hughes*, No. 216CV08962CASKSX, 2017 WL 1960633, at *10 (C.D. Cal.
22 May 8, 2017) (quoting *Binder v. Disability Grp., Inc.*, 772 F. Supp. 2d 1172, 1182
23 (C.D. Cal. 2011)).

24 Here, Defendant Sanchez was the sole owner, officer and director of FDS
25 from June 1, 2016, until present. (Ex. 28, 32-34; P 49-52). And like the sole owner
26 and president in *Int'l Mfg. Co.*, Defendant Sanchez “was in personal control of [the
27 company] and acted as its guiding spirit and the active directing hand in full charge
28 of its operations” because no one else could have been. 336 F.2d at 728.

1 Accordingly, Defendant Sanchez is personally liable the trademark infringement
2 and unfair competition described in the previous sections of this memorandum.

3 **7. Defendants' Response to Plaintiff's Section I.B.6.**

4 As set forth in Sections II.C.1.a and II.C.2.a of Defendant's motion, there is
5 no evidence, and indeed, the evidence is uniform to the contrary, that Sanchez
6 authorized or directed or participated the sending of the e-mails on which Plaintiff
7 bases its claim. Both the cases cited in Defendants' motion, and the cases cited by
8 Plaintiff here, stand for that same proposition. *See Transgo, Inc. v. Ajac*
9 *Transmission Parts Corp.*, 768 F.2d. 1001, 1021 (9th Cir. 1985) (officer or director
10 personally liable for torts which "he authorized or directs or in which he
11 participates").

12 Plaintiff also cites *International Manufacturing Co. v. Landon, Inc.*, 336 F.2d
13 723, 728 (9th Cir. 1964), suggesting that it holds that a sole owner and officer is
14 personally liable for infringement merely because he was in personal control of the
15 company. In fact, in *International Manufacturing*, the Court expressly found that
16 the individual defendant "directed the manufacture and sale" of the infringing
17 product, was the "moving, active conscious force" behind the infringement, and *for*
18 *that reason* was individually liable. *Id.* Given that it is undisputed that Sanchez
19 knew nothing about the alleged phishing e-mails, this case is not apposite and,
20 indeed, summary judgment should be granted in favor of Sanchez.

21 **8. Plaintiff's Requested Relief.**

22 Under federal law, a plaintiff is entitled to an award of statutory damages
23 where a defendant engages in trademark infringement using a counterfeit mark. The
24 Lanham Act explains:

25 In a case involving the use of a counterfeit mark . . . the plaintiff may elect, at
26 any time before final judgment is rendered by the trial court, to recover,
27 instead of actual damages and profits under subsection (a), an award of
28

1 statutory damages for any such use in connection with sale, offering for sale,
2 or distribution of goods or services in the amount of—

- 3 (1) not less than \$1,000 or more than \$200,000 per counterfeit mark
4 per type of goods or services sold, offered for sale, or distributed, as
5 the court considers just; or
6 (2) if the courts finds the use of the counterfeit mark was willful,
7 not more than \$2,000,000 per counterfeit mark per type of good or
8 services sold, offered for sale, or distributed, as the court considers
9 just.

10 15 U.S.C. § 1117(c).

11 Here, Reflex respectfully requests that the Court enter judgment in its favor
12 and grant Reflex statutory damages in the amount of \$2,000,000. As described
13 above, there is no question that the trademark infringement in this case was willful.
14 This is not a case where a market participant unknowingly infringed on another's
15 trademark. Instead, the Phishing Emails were intentionally designed to infringe
16 Reflex's SEEKING ARRANGEMENT trademark for the purpose of deceiving the
17 recipients thereof and causing them to believe that they had received an urgent call
18 to action from SeekingArrangement.com's founder and Chief Executive Officer,
19 Brandon Wade. It is hard to image a more obvious example of willful trademark
20 infringement. Accordingly, Reflex respectfully requests judgment in its favor for
21 \$2,000,000 in statutory damages as allowed by 15 U.S.C. § 1117(c)(2) plus an
22 award of attorney's fees as allowed by 15 U.S.C. § 1117(a) (stating that the "Court
23 in exceptional cases may award reasonable attorney fees to the prevailing party");
24 *see also Gracie v. Gracie*, 217 F.3d 1060, 1068 (9th Cir. 2000) (explaining that an
25 "exceptional case" is one where the infringing party "acted maliciously,
26 fraudulently, deliberately or willfully).

27 **9. Defendants' Response to Plaintiff's Section I.B.8.**

28 Plaintiff's motion seeks both statutory damages for counterfeit infringement
and attorney's fees. It is entitled to neither.

1 The request for statutory damages fails because, as noted in Section I.B.1.f
2 above, Plaintiff failed to allege a claim for counterfeit infringement and further has
3 failed to show any “counterfeit” use. In addition, the Complaint does not seek
4 statutory damages as a remedy. (Compl. at 12-13 [Defs. Ex. 1].) It would be
5 prejudicial to allow Plaintiff to seek a remedy about which Defendants would have
6 had no way of knowing was being sought until the summary judgment motion was
7 exchanged. *See Acmet, Inc. v. Wet Seal, Inc.*, 2015 WL 11670161, at *3-*6 (C.D.
8 Cal. 2015) (refusing to allow plaintiff to seek enhanced statutory damages for
9 copyright infringement because they were not included in prayer nor in allegations
10 of complaint and defendants would be prejudiced if required to defend against a
11 theory about which they had no notice).

12 Plaintiff asks for statutory damages of \$2,000,000, the maximum amount
13 allowed, relying on a statute that allows damages in that amount for “willful”
14 infringement. Plaintiff, though, has presented zero evidence that either of the
15 Defendants knew anything about the alleged phishing e-mails. There is no basis for
16 damages in this amount.

17 Furthermore, “a reasonable statutory damage award must bear a plausible
18 relationship to the Defendant’s profits from infringement.” *Wine Grp., LLC v. USA*
19 *California Fengshiya Wine Grp., Ltd.*, 2011 WL 3189361, at *3 (C.D. Cal. 2011).
20 Plaintiff has produced no evidence that any person ever subscribed to any of
21 Defendants’ websites as a result of this supposed phishing scheme, and there is no
22 reason to believe anybody ever did. Thus, even if Plaintiff could establish that
23 Defendants engaged in counterfeit infringement through the five e-mails it has been
24 able to produce, it would properly receive the lowest level of statutory damages –
25 that is, \$1,000. 15 U.S.C § 1117(c).

26 The same is true for Plaintiff’s request for attorney’s fees, which are to be
27 awarded only in “exceptional” cases. The only thing that is exceptional in this case
28 is that Plaintiff is seeking summary judgment without offering a shred of evidence

1 that either of the Defendants have engaged in the acts upon which the claim is
2 based.

3 Plaintiff's requests for statutory damages and attorney's fees should be
4 rejected out of hand.

5 **C. Conclusion**

6 Plaintiff Reflex Media, Inc., respectfully requests that the Court grant
7 summary judgment in its favor on the claims, and for the reasons, set forth above.

8
9 **II. DEFENDANTS FDS SOLUTIONS' AND SANCHEZ'S MOTION FOR**
10 **SUMMARY JUDGMENT.**

11 **A. Introductions**

12 **1. Defendants' Introduction**

13 Defendants FDS Solutions Ltd. ("FDS") and Maria del mar Martinez
14 Sanchez ("Sanchez") move for summary judgment because they have been wrongly
15 accused of carrying out a massive "phishing" scheme against Plaintiff Reflex
16 Media, Inc. ("Reflex"). The evidence is undisputed that they played no role in
17 sending the e-mails that form the basis of the alleged scheme, did not know they
18 were being sent, and did not authorize them to be sent. Bottom line, Defendants
19 were not involved and Reflex has sued the wrong parties.

20 Reflex alleges that customers of its "sugar daddy" website received e-mails
21 purporting to be from Reflex's CEO, which caused those customers to click on a
22 link, enter their credit card information, and thereby subscribe to other websites not
23 affiliated with Reflex. The only evidence of this scheme that Reflex has produced
24 is a total of *five* such e-mails, all sent to a single person. Reflex produced no
25 evidence that any other person received the e-mail or that any of its customers
26 actually clicked on the link in the e-mail and fell for the scheme. *But that is not*
27 *Reflex's biggest problem on this motion.*
28

1 The evidence is undisputed that FDS and Sanchez had nothing to do with
2 these e-mails. Specifically, the undisputed evidence shows:

- 3 • FDS and Sanchez had no knowledge of these e-mails prior to receiving
4 the complaint in this action;
- 5 • Neither FDS nor Sanchez own the e-mail addresses from which the e-
6 mails at issue were sent or know who does own those addresses;
- 7 • Neither FDS nor Sanchez participated in creating or disseminating the e-
8 mails or knew that they were being created or disseminated;
- 9 • Neither FDS nor Sanchez has any idea who sent the e-mails.
- 10 • Defendants have no reason to believe that any person joined their website
11 as a result of these e-mails.

12 The only connection Reflex can make between FDS and these e-mails is so
13 attenuated as to be absurd. Reflex contends that when one clicks on the link in the
14 e-mails, it brings up a “verification page” where the consumer puts in credit card
15 information and which lists the websites to which the consumer is subscribing and
16 the company which is processing the credit card. According to Reflex, each time
17 the link is clicked a different website and different processing company appears.
18 To that effect, Reflex produced 480 different “screenshots” of verification pages
19 created from the e-mails; these screenshots list 311 different websites and 69
20 different credit card processors. Of the 480 screenshots Reflex produced, a grand
21 total of *five* refer to FDS and one of its websites. FDS and Sanchez do not own or
22 operate any of the other websites or companies listed on the 475 other screenshots
23 of verification pages.

24 Neither FDS nor Sanchez has any idea why a few of FDS’s websites and the
25 FDS name appears on those five screenshots. What is undisputed is that *they had*
26 *nothing to do with it and didn’t authorize it*. Perhaps the answer might have been
27 found by taking discovery from some of the other companies whose names were on
28

1 the other 475 verification pages; we'll never know because Reflex chose not to take
2 any of those depositions or seek any documents from them.

3 Bottom line, though, the fact that 1% of the screenshots mention FDS is not
4 sufficient evidence to create a material dispute of fact as to whether FDS played a
5 role in disseminating the e-mails, when faced with the flat out denial by FDS. And
6 in any event, it certainly fails to create any dispute of fact as to Sanchez. Therefore,
7 Reflex has failed to create a material dispute of fact as to liability of either of the
8 two Defendants and Defendants' motion for summary judgment should be granted
9 in its entirety.

10 **2. Plaintiff's Response to Defendants' Introduction**

11 Defendants' *only* evidence is the self-serving declaration by the sole owner
12 and operator of the websites at issue, Maria Sanchez, who refused to appear for a
13 deposition. It is literally her word—unverifiable, not subject to deposition and
14 contradicting their own discovery responses—against voluminous documentary
15 evidence that shows Sanchez and FDS were involved, benefitted and, even after
16 purportedly learning for the first time of their own involvement, continued to be
17 involved month after month after month. Under these circumstances, Defendants
18 should, of course, not be permitted to use this declaration as evidence in this case.
19 However, even if it is admitted, it does not save Defendants from liability as
20 Defendants cannot ignore and avoid liability for the tortious misconduct of the
21 agents they contracted to have work on their behalf.

22 Defendants have misled Plaintiff and evaded discovery from the beginning of
23 this lawsuit and continue to try to do so even in this instant motion^{3 4}. For the first

24 ³ Defendants falsely claim that "the FDS name appears on [] five screenshots."
25 However, their own Ex. 4 pages 3-9, lines 89, 93, 127, 135, and 278 and Plaintiffs'
26 Exs. 7-15 show that FDS appeared in 9 screenshots.

27 ⁴ Defendants also make the claim that "FDS also owns approximately 25 other
28 online member subscription dating websites" in addition to
findyourtruesoulmate.com. (*See* Section II.B.1.a, *infra*). However, a material
dispute of fact exists as CloudFlare Inc.'s business records show that the user ID
associated with findyourtruesouldmate.com *et. al.*, is also associated with hundreds
of other dating websites which Defendants may own or control. *See* Exs. 37-40; *see*

1 time during this litigation, Defendants now identify unnamed and unidentifiable
2 bad actors—the identities of which, if they even exist, should have been disclosed
3 in discovery responses and Rule 26 disclosures—that are somehow uniquely
4 responsible and beyond their control even though these mystery third-parties
5 supposedly ran Defendants’ Websites at Defendants’ request. To this end,
6 Defendants claim that “FDS contracts with third party service providers, such as
7 hosting companies, etc., to operate, maintain, and market its websites. [Defendant
8 Sanchez] rel[ies] on those third party service providers to perform these functions
9 and [Defendant Sanchez] personally play[s] no role in operating or marketing the
10 websites.” (Sanchez Decl. at ¶ 3). This unsupported statement comes, of course,
11 after Defendants refused to appear for their depositions and stated in discovery
12 responses and to the Court that they owned and operated the websites at issue here.
13 Plaintiff’s Special Interrogatory No. 9 (and gave a similar answer to Interrogatory
14 No. 12), asked them to “Identify all other websites owned/operated by
15 DEFENDANTS from 2016 to the present” (DEFENDANTS was a defined term
16 which included FDS and Ms. Sanchez’s agents⁵), as follows: “During calendar year
17 2016, Defendant FDS owned **or** operated the following websites: [list of 31
18 websites owned by FDS Solutions Limited] [. . .] During the relevant time period,
19 Defendant Sanchez[‘s] [. . .] role in operating the above websites was only as
20 director/shareholder of FDS.” (Emphasis added) (*see* Plaintiff’s Ex. 17, 26, 30). To
21 clarify any confusion, at the hearing on Plaintiff’s motion to compel Defendants’
22 responses to Special Interrogatories 9 and 12 (among other things), Defendant’s
23 counsel twice indicated that Defendants understood that these interrogatories asked
24 if Defendants “owned **and** operated” the Websites. (*See* Ex. 36 at 10:6-21, 11:18-
25 25, 12:1-3.) Even if they did not operate the Websites, Defendants cannot simply

26 Supplemental Schaeffer Decl. at ¶¶ 8-10.

27 ⁵ The term DEFENDANTS was defined as “Defendants MARIA DEL MAR
28 MARTINEZ SANCHEZ and FDS SOLUTIONS, unless expressly stated otherwise,
and their present and former employees, agents, representatives, attorneys and any
other PERSONS acting on its behalf.” (*See* Ex. 35 at 2:4-7).

1 hang their liability on agents they have a duty to direct and monitor by turning a
2 blind eye to their infringing conduct.

3 As further discussed below, even if Defendants' late revelation is true,
4 Defendants are still liable for trademark infringement under tort and agency
5 principals, including contributory trademark infringement and vicarious liability.
6 Lastly, Defendants also argue in their Introduction that "the fact that 1% of the
7 screenshots mention FDS is not sufficient evidence to create a material dispute of
8 fact as to whether FDS played a role in disseminating the e-mails, when faced with
9 the flat out denial by FDS." This argument is illogical and unavailing. The fact that
10 any one particular party involved in this scheme participated or benefitted less than
11 any other participants, or that all participants benefitted a little, does not change the
12 fact that each and every one of them is still liable for their unlawful acts. If the
13 Court were to accept Defendants' argument, then every company that benefits from
14 the phishing scheme, including the other 68 companies identified by Defendants,
15 could rely on the same defense and no one would be liable for the trademark
16 infringement that occurred.

17 **B. Statements of Facts**

18 **1. Defendants' Statement of Undisputed Facts**

19 **a. The Parties**

20 Plaintiff Reflex Media, Inc. ("Reflex" and "Plaintiff") owns and operates an
21 online dating website called "Seeking Arrangement," located at
22 www.seekingarrangement.com. (D53; Complaint, ¶ 2 [Ex. 1 hereto].) The
23 "Seeking Arrangement" website caters to a niche market of the online dating world:
24 pairing "sugar daddies" who are interested in pampering "sugar babies" with
25 shopping sprees, expensive dinners, exotic vacations (and presumably other
26 consideration) in exchange for their "companionship." (Complaint, ¶ 2 & n.1.)
27 Plaintiff claims to have the exclusive license to the trademark SEEKING
28

1 ARRANGEMENT and uses it in connection with its website. (Complaint, ¶¶ 28-
2 30.)

3 FDS is a United Kingdom company that owns the online member
4 subscription dating website www.findyourtruesoulmate.com. FDS also owns
5 approximately 25 other online member subscription dating websites. (D54 & D55;
6 Sanchez Decl., ¶ 2.)

7 Sanchez, a resident of the United Kingdom, is the shareholder, director, and
8 sole employee of FDS. (D56 & D57; Sanchez Decl., ¶¶ 1, 3.) FDS contracts with
9 third party service providers, such as hosting companies, etc., to operate, maintain,
10 and market the websites. Sanchez relies on those third party service providers to
11 perform these functions and personally plays no role in operating or marketing the
12 websites. (D58, D59, D60; Sanchez Decl., ¶ 3.)

13 **b. Plaintiff Alleges A Massive Phishing Scheme, But**
14 **Produced Evidence Of Only Five E-mails Sent To A**
15 **Single E-mail Address.**

16 In its Complaint, Plaintiff alleges that Defendants, in July 2016, sent a series
17 of e-mails, directed to Reflex's customers, which purported to be sent from the
18 CEO of Seeking Arrangement. (Complaint, ¶¶ 6, 35.) Plaintiff refers to these e-
19 mails as "Phishing Emails," contending that these e-mails were intended to obtain
20 personal identifying information and credit card data from Seeking Arrangement's
21 customers under false pretenses. (Complaint, ¶ 10.)

22 The actual evidence produced by Plaintiff during this case is quite different
23 than what was alleged. In its Rule 26 disclosures and in response to discovery
24 requests, Plaintiff produced a total of five separate e-mails that it claims to be part
25 of the phishing scheme. (D61; Metzidis-Drennan Decl. ¶¶ 11-14; Ex. 10 at 3:14-15
26 [First Supp. Rule 26 Disclosures]; Ex. 8 at 12:25-13:2 [Resp. to RFP No. 3]; Ex. 11
27 [five emails in native format]; Ex. 12 [duplicates of five emails with Bates
28 numbers].) These five e-mails are the *only* e-mails identified by Plaintiff in

1 response to an interrogatory asking for every e-mail Plaintiff alleges that FDS or
2 Sanchez disseminated or caused to be disseminated. (D62; Ex. 9 at 5:9-17 & 6:13-
3 18 [Supp. Resps. to Interrogatory Nos. 3 & 5]; Exs. 11 & 12; Metzidis-Drennan
4 Decl. ¶ 11-14.)

5 Each of these five e-mails was sent from one of two e-mail addresses:
6 ceoseekingarrangement@gmail.com or seekingmanagementceo@gmail.com.
7 (D63; Ex. 11.)

8 Each of these five e-mails was sent to a single e-mail address:
9 Machac9791@yahoo.com. (D64; Ex. 11.) Plaintiff produced no e-mails addressed
10 to any other e-mail address, provided no evidence that any of these e-mails were
11 sent to any other person (let alone to Plaintiff's customers), and identified no
12 customer in its disclosures who had received any of the e-mails. (D65, D66, D67;
13 Metzidis-Drennan Decl., ¶¶ 15-16; Ex. 10 at 2:1-3:8 [First Supp. Rule 26
14 Disclosures].)

15 **c. Defendants Do Not Own Or Control The E-mail**
16 **Addresses From Where The Five E-mails Were Sent.**

17 Neither Sanchez nor FDS owns or controls the e-mail addresses
18 ceoseekingarrangement@gmail.com or seekingmanagementceo@gmail.com.
19 Sanchez does not know who owns or controls those e-mail addresses. Before
20 receiving the Complaint, Sanchez had never heard of those addresses. (D68, D69,
21 D70; Sanchez Decl., ¶ 5.)

22 **d. Defendants Had No Involvement In, or Knowledge Of,**
23 **The Dissemination Of The E-Mails At Issue.**

24 Before receiving a copy of the complaint in this lawsuit, Sanchez had no
25 knowledge of the e-mails that Plaintiff claims are part of the alleged phishing
26 scheme. (D71; Sanchez Decl., ¶ 4.)

27 Sanchez did not draft and was not involved in the drafting of those e-mails.
28 Sanchez did not send or disseminate, and had no involvement in the sending or

1 dissemination, of those e-mails. Sanchez has no knowledge as to who was involved
2 in drafting, sending, or disseminating those e-mails. (D72, D73, D74; Sanchez
3 Decl., ¶ 4.)

4 Sanchez has no idea to whom the e-mails were sent or if they were sent at all.
5 (D75; Sanchez Decl., ¶ 6.)

6 Prior to the filing of the complaint, Sanchez had no knowledge of Reflex
7 Media, Inc., its CEO Brandon Wade, the SEEKING ARRANGEMENT trademark,
8 or the website www.seekingarrangement.com. She has taken no action to interfere
9 with Reflex Media's relationship with its customers. (D76, D77; Sanchez Decl.,
10 ¶ 12.)

11 e. **Defendants Did Not Authorize Anybody To Use FDS's**
12 **Name Or The Name of Any Of Its Websites In**
13 **Connection With These E-mails.**

14 Plaintiff has no direct evidence that either of Defendants participated in the
15 drafting or dissemination of the e-mails or knew anything about them. The *sole*
16 evidence upon which Plaintiff relies, then, to show any connection between
17 Defendants and these e-mails is as follows:

18 The five e-mails produced by Plaintiff each provide a link which, when
19 clicked on, opens a website asking for name and credit card information. (D78;
20 Metzidis-Drennan Decl. ¶ 18.) In the last prompt before the button is clicked to
21 send off the user's credit card information, there appears a "Verification" page, the
22 fine print of which states (1) the name of the website or websites to which the
23 consumer is subscribing, (2) the domain name of the website that will be processing
24 credit card information, and (3) the name of the company processing the credit card.
25 (D79; Metzidis-Drennan Decl. ¶ 19.) An example of this fine print is reproduced
26 below:
27
28

By pressing 'Click Here For Access', I certify that I have read and agree to the complete terms of membership and billing and that the card entered above is my credit card. Your access to CamPleasures includes a 2 day free trial promo to Idealistic Relationships. If you choose to remain a member of Idealistic Relationships beyond the trial period, your membership will renew at thirty nine dollars and ninety nine cents. Your membership to CamPleasures will be Free for Lifetime. You will also receive a free membership to Uberhorny.

Your IP Address has been logged for fraud protection.

Charges made to your credit card will appear under "dstctshp.com (800)837-9031", operated by Columbus Creations Sociedad Limitada, an eCommerce Merchant located in Spain.

(See Wilson Decl. ¶ 3.)

Counsel for Plaintiff has represented that each time the link is clicked, different websites, credit card processing websites, and credit card processing companies appear. (D80; Metzidis-Drennan Decl. ¶ 20.) To that effect, Plaintiff produced 480 different screenshots of the Verification Page. Those 480 screenshots display 311 different websites, 309 different credit card processing websites, and 69 different credit card processors. (D81, D82; Metzidis-Drennan Decl. ¶ 21; Wilson Decl. ¶¶ 2-5; Exs. 3, 4, 5.)

Of the 480 screenshots produced by Plaintiff, a total of five include reference to one of Defendant FDS's websites, credit card processing sites, or FDS itself. (D83; Sanchez Decl., ¶¶ 9-11.) As a result, Plaintiff argues that FDS (and therefore Sanchez) *must* have been involved in preparing or disseminating these e-mails.

In fact, Sanchez did not direct anybody to include FDS or its websites in the Verification Pages, nor did she have any idea that this was happening. The first she heard of it was during discovery in this case. (D84, D85, D86; Sanchez Decl., ¶ 7.)

Furthermore, neither FDS nor Sanchez owns or operates any of the other websites (including the credit card processing websites) contained in the hundreds of other screenshots produced by Plaintiff. Nor do FDS or Sanchez have any ownership interest in the other credit card processing companies listed on those screenshots. (D87, D88; Sanchez Decl., ¶¶ 9, 10, 11.)

1 In any event, there is no evidence that any person (other Plaintiff's or its law
2 firm's employees) ever clicked on the link contained in the e-mail, ever entered his
3 or her credit card information, or ever subscribed to any of FDS's websites as a
4 result of these e-mails that Plaintiff claims to be part of a phishing scheme. (D89,
5 D90, D91; Metzidis-Drennan Decl. ¶ 22; Ex. 10 at 2:1-3:8 [First Supp. Rule 26
6 Disclosures].)

7 f. **Plaintiff Has No Facts Showing That Sanchez Had**
8 **Any Involvement In The E-mails It Claims To Be Part**
9 **of A Phishing Scheme.**

10 In interrogatory requests, Defendants asked Plaintiff to state all facts upon
11 which it bases its contentions that Sanchez (1) ever used its trademark in the
12 distribution of e-mails, (2) disseminated or caused to be disseminated any of the e-
13 mails that identify the sender of the e-mail as Brandon Wade, Plaintiff's CEO,
14 (3) misused the SEEKING ARRANGEMENT trademark, and (4) intentionally
15 interfered with the relationship between Reflex Media and its customers. (D92;
16 Ex. 6 at 1-3 [Special Interrogatory Nos. 2, 5, 6, 8, 10, and 12].)

17 In response to each of these interrogatories, the only information provided
18 about Ms. Sanchez's role in any of these activities was the hearsay statement that
19 Reflex Media "contacted Tucows, Inc., the registrar for the www.fndrtsmt.com
20 URL and was informed that the URL was registered to" Sanchez and FDS. (D93;
21 Ex. 8 at 3-10 [Resps. to Special Interrogatory Nos. 2, 5, 6, 8, 10, and 12].)

22 Plaintiff later served supplemental responses to these interrogatories and the
23 only additional information provided in the supplemental responses was the hearsay
24 statement that, "based on conversations with Defendants' counsel, Reflex Media
25 understands that Ms. Sanchez is the sole officer and director of FDS Solution [sic]
26 and that FDS Solutions has no employees." (D94; Ex. 9 at 4-11 [Supp. Resps. to
27 Special Interrogatory Nos. 2, 5, 6, 8, 10, and 12].)
28

1 In other words, Reflex has no information whatsoever that Sanchez played
2 any role in this supposed phishing scheme.

3 **2. Plaintiff's Statement of Undisputed Facts**

4 Rather than provide another recitation of facts, Plaintiff respectfully refers
5 the Court to Plaintiff's portion of the Statement of Uncontroverted Facts filed
6 concurrently herewith. Plaintiff disputes many of the factual averments in
7 Defendants' "Statement of Undisputed Facts," and has lodged its objections in the
8 Statement of Uncontroverted Facts, as contemplated by the Court's standing order.
9 Relevant facts are also identified in Plaintiff's motion above and accompanied by
10 an appropriate citation to Plaintiff's Statement of Uncontroverted Facts.

11 **3. Plaintiff's Evidentiary Objections to Defendants' Statement**
12 **of Uncontroverted Facts**

13 **a. Objection to Declaration of Defendant Sanchez**

14 Plaintiff objects to the declaration of Maria Del Mar Martinez Sanchez
15 because it should be excluded pursuant to Fed. R. Civ. P. 37(c)(1). For their failure
16 to accurately respond and their failure to update their discovery responses,
17 Defendants should not be allowed to use their purported evidence. Prior to filing
18 this motion, Defendants Sanchez and FDS failed to mention that third-party agents
19 operate FDS' websites and that Defendant Sanchez "personally play[s] no role in
20 operating or marketing the websites." The law, however, requires that "[a] party [. .
21 .] who has responded to an interrogatory, request for production, or request for
22 admission—must supplement or correct its disclosure or response: [. . .] in a timely
23 manner if the party learns that in some material respect the disclosure or response is
24 incomplete or incorrect, and if the additional or corrective information has not
25 otherwise been made known to the other parties during the discovery process or in
26 writing." Fed. R. Civ. P. 26(e)(1)(A). The automatic, self-executing sanction for
27 failing to provide information as required by Fed. R. Civ. P. 26(e) is that "the party
28 is not allowed to use that information [. . .] to supply evidence on a motion, at a

1 hearing, or at a trial, unless the failure was substantially justified or is harmless.”
2 Fed. R. Civ. P. 37(c)(1); *see Yeti by Molly, Ltd. v. Deckers Outdoor Corp.*, 259 F.3d
3 1101, 1106 (9th Cir. 2001) (noting that sanctions under Fed. R. Civ. P. 37(c)(1) are
4 automatic and self-executing and that “Courts have upheld the use of the sanction
5 even when a litigant's entire cause of action or defense has been precluded”).

6 Defendants’ response to Special Interrogatory No. 9 was incomplete and
7 misleading—especially in light of the representations made by counsel during the
8 hearing on Plaintiff’s motion to compel those responses—and as such, Defendants
9 should have supplemented their responses in a timely fashion, well before filing the
10 instant motion. Because Defendants did not supplement their discovery responses
11 and have apparently attempted to ambush Reflex with this late disclosure, the
12 Sanchez Declaration should be excluded by the Court. In the absence of this self-
13 serving declaration, Defendants have presented no evidence to support their claim
14 that they had no knowledge of the Phishing Scam. Moreover, it is worth noting that
15 even now, Defendants continue to refuse to provide the identity of the third parties
16 supposedly responsible for operating Defendants’ Websites.

17 **b. Objections to Characterization of “Hearsay” Evidence**

18 Plaintiff also objects to the hearsay characterizations of evidence made by
19 Defendants in D93-94 and Section II.B.1.f, *supra*:

- 20 • “In response to each of these interrogatories, the only information
21 provided about Ms. Sanchez’s role in any of these activities was the
22 hearsay statement that Reflex Media “contacted Tucows, Inc., the
23 registrar for the www.fndrtsmt.com URL and was informed that the URL
24 was registered to” Sanchez and FDS.”
25 • “Plaintiff later served supplemental responses to these interrogatories and
26 the only additional information provided in the supplemental responses
27 was the hearsay statement that, “based on conversations with Defendants’
28 counsel, Reflex Media understands that Ms. Sanchez is the sole officer

1 and director of FDS Solution [sic] and that FDS Solutions has no
2 employees.””

3 Defendants’ characterization of the statements as “hearsay” is an
4 inappropriate legal conclusion that cannot be made until the evidence is offered and
5 the purpose for which it is offered is identified. *See* Fed. R. Evid. 801. Similarly,
6 only once the evidence is offered can the Court determine if one of the exceptions
7 to the hearsay rule may apply. *Id.*

8 **C. Argument**

9 **1. Defendant Sanchez is Entitled To Summary Judgment.**

10 **a. On The Undisputed Facts, Sanchez Is Not Liable for**
11 **Trademark Infringement.**

12 On its First Claim for Relief, Plaintiff seeks to hold Sanchez personally liable
13 for Trademark Infringement under 15 U.S.C. § 1114 based solely and exclusively
14 on her status as a director and shareholder of co-defendant FDS. We discuss in
15 Section II.C.2 below why the evidence is insufficient to hold FDS liable for these
16 claims. But even if Plaintiff could create a dispute of fact about FDS’s liability
17 (and it cannot), *Sanchez’s* status as director and shareholder of FDS is insufficient
18 as a matter of law to hold *her* personally liable for trademark infringement.

19 To establish trademark infringement, a plaintiff must show (1) that it has a
20 protectable mark, and (2) that the alleged infringer’s use of the mark has created a
21 likelihood of consumer confusion. *Survivor Media, Inc. v. Survivor Prods.*, 406
22 F.3d 625, 630 (9th Cir. 2005).

23 The issue here is whether Sanchez ever “used” the mark. Plaintiff has
24 absolutely no evidence that Sanchez was involved in preparing or disseminating the
25 e-mails in question, or that Sanchez even knew about these e-mails. To the
26 contrary, Plaintiff’s argument seems to be that because FDS’s websites are listed on
27 a small fraction of the verification pages, FDS therefore *must have been* involved in
28

1 preparing or disseminating these e-mails, and that, as the sole director and
2 shareholder of FDS, Sanchez is liable too.

3 Case law rejects this argument out of hand. Under the Lanham Act, “a
4 corporate officer may be held personally liable for trademark infringement and
5 unfair competition if the officer is a *moving, active conscious force* behind [the
6 defendant corporation’s] infringement.” *TI Beverage Grp. Ltd. v. S.C. Cramele*
7 *Recas SA*, 2014 WL 12013438, at *8 (C.D. Cal. 2014), *quoting*, *Lee Myles Auto*
8 *Group, LLC v. Fiorillo*, 2010 WL 3466687, *7 (S.D.N.Y. 2010) (emphasis added).

9 Courts have repeatedly granted summary judgment in favor of individual
10 corporate officers or directors on trademark infringement claims where there is no
11 evidence that they were the moving force behind the infringement. *See, e.g., Minka*
12 *Lighting, Inc. v. Bath Kitchen Décor, LLC*, 2015 WL 12743863 at *8-9 (C.D. Cal.
13 2015) (granting summary judgment on trademark infringement claim in favor of
14 defendant officer because there is no evidence to contradict defendant officer’s
15 testimony that “he did not authorize, direct or participate in the trademark
16 infringement”); *Microsoft Corp. v. Suncrest Enter.*, 2006 WL 1329881, at *7 (N.D.
17 Cal. 2006) (granting summary judgment because “[W]hile sole shareholder and
18 officer of [defendant corporation] certainly had authority to give direction to the
19 sales department, she did not personally participate in purchasing decisions outside
20 of instructing the sales department to purchase from established, reputable vendors”
21 and therefore had no individual liability for trademark infringement); *Midas Int’l*
22 *Corp. v. Poulah Inv’rs, LLC*, 2016 WL 4532033, at *9 (D. Md. 2016) (granting
23 summary judgment where Plaintiff “has neither alleged nor provided evidence
24 demonstrating how any of the Individual Defendants personally participated in the
25 continued use of [Plaintiff’s] trademarks”); *see also Sara Lee Corp. v. Am.*
26 *Leather Prod., Inc.*, 1998 WL 433764, at *19 (N.D. Ill. 1998) (on preliminary
27 injunction motion, holding that while Defendant Rappin “is the owner, president,
28 and sole financier of [the corporate defendant],” Plaintiff did not “offer evidence

1 that Mr. Rappin oversaw and approved of the infringing activities committed by
2 [the corporation]” and that he is therefore not personally liable).

3 Sanchez’s status as director and shareholder of FDS is insufficient, then, to
4 establish liability for trademark infringement for two reasons. First, as shown in
5 Section II.C.2, below, FDS did not engage in trademark infringement. Second,
6 even if Plaintiff could somehow show FDS’s liability, Sanchez was not the
7 “moving force” behind any infringement. Sanchez did not personally participate or
8 oversee the alleged sending of the e-mails that Plaintiff claims to be part of a
9 phishing scheme. (D72, D73, D68, D84, D77.) Indeed, she had no knowledge of
10 their existence until after the Complaint was filed, and still has no idea who sent
11 them or why. (D71, D74, D75, D69, D70, D85, D86.) As such, summary
12 judgment in Sanchez’s favor should be granted.

13 **b. Plaintiff’s Response to Defendants’ Section II.C.1.a:**
14 **The Standards for Infringement Based on Secondary**
15 **Liability for Defendant Sanchez is the same as**
16 **Corporate Defendant FDS.**

17 Individuals are held to the same secondary liability standards as corporate
18 defendants; therefore, this Court should take Defendant Sanchez’s actions **and**
19 **omissions** into account and find her liable as the sole shareholder, director, and
20 employee of FDS. *See OTR Wheel Eng’g, Inc. v. W. Worldwide Servs., Inc.*, No.
21 2:14-CV-00085-LRS, 2014 WL 11514767, at *2–3 (E.D. Wash. Aug. 1, 2014)
22 (citing *Coach, Inc. v. Sapatis*, 27 F. Supp. 3d 239 (D. N.H. 2014) (finding that a
23 corporate agent could be held secondarily liable for trademark infringement); *see*
24 *Coach, Inc. v. Sapatis*, 27 F. Supp. 3d 239, 244-48 and 246 n.10 (D.N.H. 2014)
25 (citing *Inwood*, 456 U.S. at 854 and *Hard Rock*, 955 F.2d at 1149) (finding that
26 personal liability for contributory infringement for an owner, manager, and sole
27 member of a limited liability company “will be judged under the same standard that
28 would apply to any other defendant...” and that the standard for contributory

1 trademark infringement is met when the individual or entity “fails to act once it has
2 actual knowledge, has reason to know, or is willfully blind to the fact that it is
3 supplying a service to one who is engaging in direct trademark infringement.”); *see*
4 *Adobe Sys. Inc. v. Childers*, No. 5:10-CV-03571 JF/HRL, 2011 WL 566812, at *6–
5 7 (N.D. Cal. Feb. 14, 2011) (citing *Babbitt Electronics v. Dynascan Corp.*, 38 F.3d
6 1161, 1184 (11th Cir.1994)) (“A plaintiff may show that a corporate employee is
7 the moving, active, conscious force behind the infringing activity by demonstrating
8 that the corporate officer directs, controls, **ratifies**, or participates in the infringing
9 activity”) (emphasis added) (internal quotations omitted).

10 The seminal case regarding infringement also contemplates individual
11 liability for the actions of the owner of a company, like Defendant Sanchez. In
12 *Shapiro, Bernstein & Co. v. H. L. Green Co.* the court concluded that the owner of
13 a company is “strictly liable [if he] is in a position to police the conduct of the
14 ‘primary’ infringer . . .” reasoning that if it “[w]ere to hold otherwise, [the court]
15 might foresee the prospect—not wholly unreal—of large chain and department
16 stores establishing ‘dummy’ concessions and shielding their own eyes from the
17 possibility of copyright infringement, thus creating a buffer against liability while
18 reaping the proceeds of infringement.” 316 F.2d 304, 309 (2d Cir. 1963); *see*
19 *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 264–65 (9th Cir. 1996) (“a
20 swap meet can not disregard its vendors’ blatant trademark infringements with
21 impunity”).

22 **Contributory Liability**

23 Here, in addition to Defendants choosing to stay willfully blind to their
24 supposed third-party agents’ actions since the time Defendants supposedly gave
25 them unfettered control of Defendants’ websites and marketing, Defendants were
26 also notified that Defendants’ Websites were involved in trademark infringement,
27 and this triggered a duty for Defendants to investigate and end such infringement by
28 contacting their agents and subagents to cease infringing on the trademark. *See I-*

1 800 Contacts, 722 F.3d at 1252; see *Life Alert Emergency Response, Inc. v.*
2 *LifeWatch, Inc.* (hereinafter, “*Life Alert*”), 601 F. App'x 469, 473 (9th Cir. 2015);
3 see *mophie, Inc. v. Shah*, No. SACV1301321DMGJEMX, 2014 WL 10988347, at
4 *22 (C.D. Cal. Nov. 12, 2014) (“A defendant has some duty to investigate whether
5 or not it is infringing another's trademark if it has reason to suspect that it may be”);
6 see *Coach Servs., Inc. v. YNM, Inc.*, No. 2:10-CV-02326-JST, 2011 WL 1752091,
7 at *5 (C.D. Cal. May 6, 2011) (citing *Liu*, 489 F.Supp.2d at 1123) (finding that
8 trademark infringement can exist where a defendant willfully blinds himself and
9 such infringement continued eight months after the Plaintiff filed the lawsuit).
10 However, after being on notice for eight months that there was trademark
11 infringement, and after more than a month of being on notice that the email
12 attached to this Joint Brief as Plaintiff’s Exhibit 5 existed, a hyperlink from that
13 email directed Plaintiff to multiple FDS “verification pages.” (See Sanchez Decl. at
14 ¶¶ 3-7; Ex. 5 (copy of Phishing Email), 9-15 (copies of “verification” webpages);
15 Schaeffer Decl. at ¶¶ 10-16; P39-45).

16 Defendants admit that Defendant Sanchez is the sole owner, director, and
17 employee of FDS and that FDS has no other employees; therefore, it was
18 incumbent on her to investigate and end the trademark infringement by her agents
19 and subagents. The inaction on the part of Defendant Sanchez is tantamount to
20 ratification of her agents and subagents actions. Furthermore, Defendants’ actions
21 to conceal the identities of these third-party agents throughout this litigation has
22 aided the scheme and allowed it to continue. Indeed, even as of this filing,
23 Defendant Sanchez has failed to provide the identities of the supposed agents
24 responsible for the marketing and operation of Defendants’ Websites. In fact, even
25 in their introduction to this motion Defendants throw their hands in the air and
26 claim, “Neither FDS nor Sanchez has any idea why a few of FDS’s websites and
27 the FDS name appears on those five screenshots,” demonstrating that they have
28

1 done nothing to investigate and stop future infringement and have instead elected to
2 continue and to reap the benefits of their agents' unlawful acts.

3 **Vicarious Liability**

4 Additionally, Defendants are vicariously liable because Defendants now
5 admit that they had a partnership with third-party service providers who operate and
6 market their website. *See Life Alert*, 601 F. App'x at 4731 (citing *Visa*, 494 F.3d at
7 807); (Sanchez Decl. at ¶ 3). Defendants are also vicariously liable because these
8 third-party agents have authority to bind Defendants in transactions with other
9 third-parties: as the Sanchez Declaration states, FDS and Sanchez "[contract] with
10 third party service providers, such as hosting companies, etc., to operate, maintain,
11 and market its websites." (Sanchez Decl. at ¶ 3.) Defendants and Defendants' third-
12 party service providers also exercise joint control over the infringing product
13 which, here, are the websites owned by Defendants that use infringing marketing.
14 As owner of the websites, FDS and Sanchez, could have terminated its contract(s)
15 with the third-party service providers and removed any motivation for its agents
16 and subagents to continue their infringement. *See Life Alert*, 601 F. App'x at 473
17 (Finding that a secondary trademark infringer "could exercise its right under [its]
18 agreements to terminate its relationship with [direct infringers] that fail to comply
19 with trademark law" and that "[w]ithout these contracts, [the direct infringers]
20 would have no reason to make infringing calls).

21 Because Defendants have now admitted that they have an apparent or actual
22 partnership, have authority to bind one another in transactions with third parties or
23 exercise joint ownership or control over the infringing product, Defendants should
24 be held vicariously liable for trademark infringement. If this Court allows
25 Defendant Sanchez to rely on her willful blindness to the actions of her agents and
26 subagents, then this Court would set a precedent to encourage others, like
27 Defendant Sanchez, to set up companies like hers to create "a buffer against
28 liability while reaping the proceeds of infringement." *Shapiro*, 316 F.2d at 309.

c. **For The Same Reasons She Is Not Liable for Trademark Infringement, Sanchez is Not, On the Undisputed Facts, Liable for False Designation of Origin.**

Plaintiff's second claim for relief is for false designation of origin under the Lanham Act, 15 U.S.C. § 1125. "A claim for false designation of origin under 15 U.S.C. § 1125 requires proof of the same elements as a claim for trademark infringement under 15 U.S.C. § 1114." *Kythera Biopharmaceuticals, Inc. v. Lithera, Inc.*, 998 F. Supp. 2d 890, 897 (C.D. Cal. 2014). As discussed in the preceding Section, there is not sufficient evidence for Reflex to establish its first claim for trademark infringement. Therefore, Reflex's second claim for false designation of origin must fail as well.

d. **Plaintiff's Response to Defendants' Section II.C.1.c: Defendants knowingly and willfully allowed Defendants to infringe on Plaintiff's Trademark, Therefore Defendants Are Also Liable for False Designation of Origin.**

For the same reasons that Defendants are liable for trademark infringement, Defendants are also liable for Reflex's claims against Defendants for false designation of origin. Defendants, including Defendant Sanchez, knowingly and willingly (or willfully blinded themselves and) allowed FDS' agents to infringe on Plaintiff's trademark, and therefore used the trademark "to cause confusion, deception or mistake as to 'the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person.'" *Gryphon Mobile Elecs.*, No. SACV152056DOCJCGX, 2016 WL 7637987, at *4 (C.D. Cal. July 12, 2016) (quoting 15 U.S.C. § 1125(a)(1)(A)). See Section I.B.2 for a full discussion of the reasons why Defendants are liable under Section 1125.

1 e. **On the Undisputed Facts, Sanchez Is Not Liable**
2 **Under California Business & Professions Code**
3 **§ 17200.**

4 Directors and officers cannot be held personally liable for violation of
5 California Business & Professions Code § 17200 merely by reason of their official
6 position, unless they participated in the wrong or authorized or directed that it be
7 done. *See NTD Architects v. Baker*, 950 F. Supp. 2d 1151 (S.D. Cal. 2013) (in case
8 alleging B&P § 17200 claim against corporate officers and directors, Court holds
9 “[a]lthough directors and officers of a corporation do not incur personal liability for
10 torts of the corporation merely by reason of their official position, they can be held
11 personally liable if they participate in the wrong or authorize or direct that it can be
12 done”).

13 As set forth above, Sanchez did not participate in preparing or disseminating
14 the e-mails at issue, and did not authorize or direct that this be done. (D72, D73,
15 D68, D84, D77.) As such, Sanchez cannot be held personally liable under Section
16 17200.

17 f. **Plaintiffs’ Response to Defendants’ Section II.C.1.e:**
18 **Because Defendants Knowingly and Willfully Allowed**
19 **its Agents to Infringe on Plaintiff’s Trademark,**
20 **Defendants are Liable for Unfair Competition.**

21 For the same reasons that Defendants are liable for trademark infringement,
22 Defendants are also liable for Reflex’s claims against Defendants for unfair
23 competition under Cal. Bus. & Prof. Code § 17200 *et seq.* Defendants—themselves
24 or through their supposed agents—knowingly and willingly infringed on Plaintiff’s
25 trademark; therefore, Defendants have “engaged in [] “unlawful, unfair or
26 fraudulent business act or practice [or] unfair, deceptive, untrue or misleading
27 advertising.” Cal. Bus. & Prof. Code § 17200. *See Liu*, 489 F. Supp. 2d at 1123
28 (“Willfulness can be established by evidence of knowing conduct or by evidence

1 that the defendant acted with an aura of indifference to plaintiff's rights-in other
2 words, that the defendant willfully blinded himself to facts that would put him on
3 notice that he was infringing another's trademarks, having cause to suspect it")
4 (internal quotations omitted); *see Louis Vuitton S.A. v. Lee*, 875 F.2d 584, 590 (7th
5 Cir.1989); *see Hard Rock*, 955 F.2d at 1149. *See* Section I.B.4 for a full discussion
6 of the reasons why Defendants are liable under § 17200.

7 **g. On The Undisputed Facts, Sanchez is Not Liable for**
8 **Negligent Interference with Economic Advantage.**

9 Plaintiff's fourth claim for relief is for negligent interference with
10 prospective economic advantage. Plaintiff again seeks to hold Sanchez personally
11 liable on this claim as an owner and officer of FDS, without any evidence that
12 Sanchez participated in the purported scheme.

13 It is well established, however, that "[d]irectors or officers of a corporation
14 do not incur personal liability for torts of the corporation merely by reason of their
15 official position, *unless they participate in the wrong or authorize or direct that it*
16 *be done. . . .*" *U.S. Liability Ins. Co. v. Haidinger-Hayes, Inc.*, 1 Cal.3d 586, 595
17 (1970) (emphasis added); *see also Francis T. v. Village Green Owners Ass'n*, 42
18 Cal.3d 490, 508-09 (1986) ("To maintain a tort claim against a director in his or her
19 personal capacity, a plaintiff must first show that the director specifically
20 authorized, directed or participated in the allegedly tortious conduct . . . or that
21 although they specifically knew or reasonably should have known that some
22 hazardous condition or activity under their control could injure plaintiff, they
23 negligently failed to take or order appropriate action to avoid the harm . . .").

24 Therefore, to establish its claim of negligent interference against Sanchez
25 individually, Plaintiff must show that Sanchez participated in the wrongful conduct
26 or authorized or directed that it be done. As set forth above, Plaintiff has *no*
27 *evidence* that Sanchez did so, and, moreover, Sanchez disputes that she had any
28 knowledge of the e-mails or participated in preparing or sending them. (D72, D73,

1 D68, D84, D77; D71, D74, D75, D69, D70, D85, D86.) Therefore, summary
2 judgment should be granted in favor of Sanchez on the fourth claim for negligent
3 interference.

4 **h. Plaintiff's Response to Defendants' Section II.C.1.g:**
5 **Plaintiff Will Move for Statutory Damages Rather**
6 **than Pursue Its Claim for Negligent Interference.**

7 As explained above in Section I.B.8, the Lanham Act claims (*i.e.* trademark
8 infringement under § 1114 and unfair competition under § 1125) allow a plaintiff to
9 elect statutory damages in lieu of proving their actual damages. Plaintiff does not
10 know how many of its customers received the Phishing Emails or were lost a result
11 thereof. Accordingly, after considering the available evidence, Plaintiff has elected
12 to seek statutory damages in lieu of proving its actual damages. In other words,
13 rather than pursue its claim for negligent interference (and seek to recover its actual
14 damages), Plaintiff has elected to seek statutory damages on its Lanham Act claims,
15 as allowed by 15 U.S.C. § 1117 (discussed below).

16 **2. Defendant FDS is Entitled To Summary Judgment.**

17 **a. On The Undisputed Facts, FDS Is Not Liable for**
18 **Trademark Infringement.**

19 As noted above, to establish trademark infringement, Reflex must show
20 (1) that it has a protectable mark, and (2) that the alleged infringer's use of the mark
21 has created a likelihood of consumer confusion. *Survivor Media*, 406 F.3d at 630.
22 Thus, the second prong of establishing trademark infringement requires that the
23 alleged infringer *use* the mark.

24 Reflex has no evidence, let alone sufficient evidence to create a material
25 dispute of fact, that FDS ever *used* the mark. Reflex's claim of "use" is based upon
26 the allegation that FDS disseminated the e-mails at issue. (Complaint, ¶ 34.) But
27 FDS has submitted evidence – which Reflex is utterly unable to dispute – that FDS
28

1 did not disseminate the e-mails and had nothing to do with them. (D72, D73, D68,
2 D84, D77; D71, D74, D75, D69, D70, D85, D86.)

3 Therefore, there is no evidence that FDS ever used Reflex's trademark and,
4 as such, FDS is entitled to summary judgment on the trademark infringement claim.

5 **b. Plaintiff's Response to Defendants' Section II.C.2.a**

6 In response to Defendants' arguments regarding Defendant FDS's liability
7 for trademark infringement, Plaintiff Reflex incorporates by reference its arguments
8 set forth in Sections I.B.1 and II.C.1.b, *supra*.

9 **c. On the Undisputed Facts, FDS Is Not Liable for False**
10 **Designation of Origin.**

11 As noted above, "[a] claim for false designation of origin under 15 U.S.C. §
12 1125 requires proof of the same elements as a claim for trademark infringement
13 under 15 U.S.C. § 1114." *Kythera*, 998 F. Supp. 2d at 897. Because Reflex cannot
14 establish trademark infringement, its second claim for false designation of origin
15 must fail as well.

16 **d. Plaintiff's Response to Defendants' Section II.C.2.c**

17 In response to Defendants' arguments regarding Defendant FDS's liability
18 for false designation of origin, Plaintiff Reflex incorporates by reference its
19 arguments set forth in Sections I.B.2 and II.C.1.d, *supra*.

20 **e. On the Undisputed Facts, FDS Is Not Liable Under**
21 **California Business & Professions Code § 17200.**

22 Reflex's Section 17200 claim fails on two grounds. Reflex has no standing
23 to bring the claim and it has failed to prove any fraudulent, unfair, or unlawful
24 conduct by FDS.

25 No private party has standing to prosecute claim under Section 17200 unless
26 he or she "has suffered injury in fact and has lost money or property as a result of
27 the unfair competition." Cal. Bus. & Prof. Code § 17204. To satisfy these standing
28 requirements, a party must now establish "a loss or deprivation of money or

1 property sufficient to qualify as an injury in fact, i.e., *economic injury . . .*” *Law*
2 *Offices of Mathew Higbee v. Expungement Assistance Servs.*, 214 Cal. App. 4th
3 544, 555-56 (2013) (emphasis in original), *quoting Kwikset Corp. v. Superior*
4 *Court*, 51 Cal.4th 310, 322 (2011). Reflex has produced no evidence that it lost any
5 customers as a result of the supposed phishing scheme, and therefore has no
6 standing.

7 Moreover, Reflex has failed to show that FDS engaged in any “unlawful,
8 unfair or fraudulent business act or practice” as required by Business & Professions
9 Code § 17200. Again, Reflex bases its claim on the belief that FDS was involved
10 in the dissemination of the alleged phishing e-mails. On the undisputed evidence, *it*
11 *was not*. Therefore, FDS is entitled to summary judgment on the Section 17200
12 claim.

13 f. **Plaintiff’s Response to Defendants’ Section II.C.2.e:**
14 **Plaintiff Had to Spend Time and Resources to**
15 **Investigate Defendants Actions and Therefore Has**
16 **Standing to Pursue its Unfair Competition Claim**
17 **Under Section 17200.**

18 A diversion of resources untethered from litigation by Plaintiff to counteract
19 Defendants misconduct (including misconduct through willful blindness) may be
20 used to satisfy the standing requirements of Cal. Bus. & Prof. Code § 17204. *See*
21 *Animal Legal Def. Fund v. LT Napa Partners LLC*, 234 Cal. App. 4th 1270, 1283–
22 84, 184 Cal. Rptr. 3d 759, 769 (2015) (June 10, 2015) (citing *Equal Rights Center.*
23 *v. Post Properties, Inc.*, 633 F.3d 1136, 1140 (D.C.Cir. 2011)); *see also Innovation*
24 *Ventures, LLC v. Pittsburg Wholesale Grocers, Inc.*, No. C 12-05523 WHA, 2013
25 WL 1007666, at *7 (N.D. Cal. Mar. 13, 2013); *see also Philip Morris USA Inc. v.*
26 *Liu* (“*Liu*”), 489 F. Supp. 2d 1119, 1123 (C.D. Cal. 2007).

27 Upon discovery of the Phishing Emails, Plaintiff’s employees had to
28 investigate to ensure that customer information was not compromised by the

1 Phishing Emails or the alleged acts of Defendants and their agents. (*See*
2 Supplemental Wey Decl. at ¶ 2–5; *see also* Ex. 1-5). Because Defendants have
3 engaged in an “unlawful, unfair or fraudulent business act or practice [or] unfair,
4 deceptive, untrue or misleading advertising,” (trademark infringement) Defendants
5 are also liable for Unfair Competition under Cal. Bus. & Prof. Code § 17200 *et*.
6 *seq.*

7 g. **On The Undisputed Facts, FDS is Not Liable for**
8 **Negligent Interference with Prospective Economic**
9 **Advantage.**

10 To prove negligent interference with prospective economic advantage,
11 Reflex must demonstrate that:

- 12 (1) an economic relationship existed between the Reflex and a third party
13 which contained a reasonably probable future economic benefit;
- 14 (2) FDS knew of the existence of the relationship and was aware or should
15 have been aware that if it did not act with due care its actions would
16 interfere with this relationship and cause Reflex to lose in whole or in
17 part the probable future economic benefit;
- 18 (3) FDS was negligent; and
- 19 (4) such negligence caused damage to Reflex in that the relationship was
20 actually interfered with or disrupted and Reflex lost in whole or in part
21 the economic benefits reasonably expected from the relationship.

22 *Venhaus v. Shultz*, 155 Cal. App. 4th 1072, 1078 (2007).

23 Reflex cannot prove three of these elements. The evidence is undisputed that
24 FDS had no knowledge of Reflex at all. (D71, D74, D75, D69, D70, D85, D86.)
25 Given that there is no evidence that FDS knew about the e-mails, let alone
26 disseminated them, there is no evidence that FDS was negligent. And there is no
27 evidence that any of Reflex’s customers clicked on the link in the e-mail and
28

1 subscribed to the websites so Reflex cannot prove any damages. Therefore,
2 summary judgment should be granted on the claim for negligent interference.

3 **h. Plaintiff's Response to Defendants' Section II.C.2.g:**
4 **Plaintiff Will Move for Statutory Damages Rather**
5 **than Pursue Its Claim for Negligent Interference.**

6 As described in Section II.C.1.h above, Plaintiff will move for statutory
7 damages under its Lanham Act claims rather than pursue its actual damages under a
8 theory of negligent interference with prospective economic advantage.

9
10 Dated: December 28, 2017

Respectfully submitted,

11 GRODSKY & OLECKI LLP
12 Allen B. Grodsky
13 John Metzidis-Drennan

14 By: /s/ John Metzidis-Drennan
John Metzidis-Drennan

15 Attorneys for Defendants Maria Del Mar
16 Martinez Sanchez and FDS Solutions Ltd.

17 Dated: December 28, 2017

SMITH CORRELL, LLP
18 Mark L. Smith
19 Jacob L. Fannesbeck
20 Joseph A. Schaeffer

21 By: /s/ Jacob L. Fannesbeck (w/ permission)
Jacob L. Fannesbeck

22 Attorneys for Plaintiff Reflex Media, Inc.
23
24
25
26
27
28

COMPLIANCE WITH LOCAL RULE 5-4.3.4

Pursuant to Local Rule 5-4.3.4(a)(2)(i), I attest that all other signatories listed, and on whose behalf this filing is submitted, concur in this filing's content and have authorized this filing.

Dated: December 28, 2017 By: /s/ John Metzidis-Drennan
John Metzidis-Drennan